Supreme Court, U.S.
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No. 84-1491

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Appellants,

v.

MAURICE S. HEPPS, *et al.*,

Appellees.

On Appeal from the Judgment of the Supreme Court of Pennsylvania

JOINT APPENDIX

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APPEAL DOCKETED MARCH 14, 1985
PROBABLE JURISDICTION NOTED JUNE 24, 1985

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DOCKET ENTRIES
COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

1	May 4, 1976:	Complaint filed.
2	May 12, 1976:	Pltfs' Motion for Inspection of Documents pursuant to Pa. RCP 4009 filed.
3	EoDie:	Court Order filed. Pltfs' Motion for Inspection of Documents is granted, and that Defts shall produce documents requested therein at the offices of Blank Rome, Klaus & Comisky within (20) days or Defts shall be precluded from entering a defense to the claim of the Pltfs and shall not be permitted to introduce evidence at time of Trial. S/John M. Wajert, Judge.

4	May 28, 1976:	Defts Answer & New Matter filed.
5	June 1, 1976:	Notice of Deposition upon Oral Examination of Wm. Ecenbarger & Wm. Lambert filed.
6	EoDie:	Court Order filed. Order entered 5/12/76 is hereby vacated and the Defts granted until 6/22/76 in which to file an Answer to the Motion for Inspection of Documents. All proceedings to stay meanwhile. S/John M. Wajert, Judge.
7	June 2, 1976:	Order of Appearance for Defts filed. S/ David H. Marion, Esq. and Richard L. Cantor, Esq.
8	June 7, 1976:	Sheriff's Ret. Sheriff of Phila Co. deputized on 5/6/76. Served all Defts on 5/12/76 by serving Mr. Compton, person in charge of office.
9	June 21, 1976:	Defts' Answer in opposition to Pltfs' Motion for Production of Documents and New Matter filed.
10	June 23, 1976:	Pltfs' Reply & New Matter filed.
11	July 9, 1976:	Notice of Deposition upon Oral Examination of Wm. Ecenbarger & Wm. Lambert filed.
12	Aug 3, 1976:	This Case will be assigned to Judge Leonard Sugerman on Aug 4, 1976 for Desposition on Briefs.
13	Sept 27, 1976:	Pltfs' 1st set of Interrogatories to Defts filed.
14	Oct 27, 1976:	Defts' Answers and Objections to Pltfs' 1st set of Interrogatories filed.
15	Dec 20, 1976:	Defts' Interrogatories to Pltfs filed.
16	EoDie:	Motion for production of Documents filed.

17	EoDie:	Court Order filed approving Motion. S/ John E. Stively, Jr., Judge.
18	Jan 25, 1977:	Petition to vacate order and extend time for answering Motion for Inspection of Documents filed.
19	EoDie:	Rule of Court filed. Rule ret. and Hearing set for Feb 4, 1977 @ (9.00 AM in Court Room #4. S. Leonard Sugerman, Judge.
20	Jan 31, 1977:	Motion for Protective Order and extend time for answering Interrogatories filed.
21	EoDie:	Rule of Court filed. Returnable 2/14/77 @ 9:00 AM in Court Room #4. S/ Leonard Sugerman, Judge.
22	Feb 16, 1977:	Stipulation as to Court Order of 12/30/76 Answers, Depositions, etc (see papers).
23	EoDie:	Approved by the Court. S/Leonard Sugerman, Judge.
24	Mar 16, 1977:	Opinion filed.
25	EoDie:	Court Order filed. (see papers) S/ Leonard Sugerman, Judge.
26	April 25, 1977:	Answers of Wm. Pleva, Exec. of the Est. of Mary Holohan to Defts (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
27	EoDie:	Answers of Railsplitter, Inc. T/A Brewer Outlet to Defts' Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
28	EoDie:	Answers of Smulovitz Bros. Inc. T/A Brewers Outlet to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.

29	EoDie:	Answers to Factory Beer Outlet, Inc. T/A Brewers Outlet to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
30	EoDie:	Answers of General Programming Inc. to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
31	EoDie:	Answers of Maurice S. Hepps to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
32	EoDie:	Answers of Pltf, Busy Bee Beverage Co., A, Germantown Soda & Bottle Co., Inc. T/A Brewers Outlet of Chestnut Hill; B, Pottstown Distributors T/A Brewers Outlet; C, Garrett Hill Beverage Co., T/A Brewers Outlet; D, Elemar, Inc., T/A Brewers Outlet; E, Almik Inc., T/A Brewers Outlet; F, Brookhaven Beverage Distributors, Inc.; G, Doral Inc., T/A Brewers Outlet, N.F.O. Inc., T/A Brewers Outlet; H, A David Fried Inc., T/A Brewers Outlet and; I, Lackawana Beverage Distributors, T/A Brewers Outlet to Defts Interrogatories.
32	April 25, 1977:	(1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
33	April 26, 1977:	Motion to Impound Answers to Interrogatories pursuant to paragraph #3 of the Stipulation and Order dated 2/16/77.
34	EoDie:	Court Order filed approving Motion. S/Leonard Sugerman, Judge.
35	EoDie:	Answers of Smulovitz Bros, Inc. T/A Brewers Outlet; A, Busy Bee Beverage

Co. Inc. T/A Brewers Outlet; B, Germantown Soda & Bottle Co., Inc. T/A Brewers Outlet of Chestnut Hill; C, Pottstown Distributors T/A Brewers Outlet; D, A. David Fried, Inc. T/A Brewers Outlet; E, Garrett Hill Beverage Co. T/A Brewers Outlet; F, Elemar Inc. T/A Brewers Outlet; G, Lackawanna Beverage Distributors T/A Brewers Outlet; H, Brookhaven Beverage Distributors, Inc.; I, Factory Beer Outlet, Inc. T/A Brewers Outlet; J, Doral Inc. T/A Brewers Outlet; K, Almik, Inc. T/A Brewers Outlet; L, General Programming, Inc.; M, Maurice S. Hepps; N, N.F.O. Inc., T/A Brewers Outlet; O, Railsplitter, Inc. T/A Brewers Outlet; P, Wm. Pleva, Exec of Est. of Mary Holahan, to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.

36	May 9, 1977:	Praecipe to Amend Caption as to Pltf filed Changing — Brewers Outlet of Chestnut Hill to Germantown Soda & Bottle Inc., T/A Brewers Outlet of Chestnut Hill.
37	May 17, 1977:	Praecipe filed directing the Prothy to mark the above Case discontinued as to Pltfs — Caro, Inc., Big Jacks, Inc., V. Bruno Jr., Inc., Landmar, Inc. and Nadbein, Inc. filed.
	EoDie:	This Case is discontinued as to the above Pltfs by Doris M. Skiles, Deputy.
38	May 18, 1977:	Notice of Oral Deposition of William Ecenbarger and William Lambert filed.
39	Aug 12, 1977:	Notice of Oral Deposition of Frank Mazzei filed.

40 Sept 1, 1977: Notice of taking Deposition of Sidney Simon filed.

41 Feb 21, 1978: Deposition of Sidney A. Simon, Esq. filed.

42 EoDie: Pre-Oral examination of William Lambert filed.

43 EoDie: Pre-Oral examination of William E. Ecenbarger filed (3 vols).

44 EoDie: Original Depositions exhibits of Wm. Lambert, Wm. Ecenbarger, Sidney Simon filed.

45 Feb 24, 1978: Motion of William H. Lamb, Esq. to lift the impoundment order entered on 4/26/77 filed.

46 EoDie: Court Order filed. Answers to the Interrogatories which were subject of prior impoundment order of 4/26/77 are directed to be unsealed by Prothy and said impoundment order of 4/26/77 is vacated. S/Leonard Sugerman, Judge.

47 Aug 7, 1978: Defts Interrogatories to Pltf — Maurice Hepps (set #2) filed.

48 Sept 15, 1978: Answers of Maurice Hepps to Defts Interrogatories (set #2) filed.

49 Dec 29, 1978: Pltfs 2nd set of Interrogatories to Defts filed.

50 Jan 15, 1979: Defts' Objections to Pltfs 2nd set of Interrogatories filed.

51 Jan 22, 1979: Requests for Admissions filed.

52 Feb 6, 1979: Defts' Motion for extension of time to respond to Pltfs' requests for Admission filed.

53 EoDie: Court Order filed. Ordered that Defts shall have (30) days from date of this Order to respond. S/John M. Wajert, Judge.

54 Feb 9, 1979: Motion for Trial by Jury filed.

55 EoDie: Rule of Court filed. Rule returnable 2/28/79. S/John M. Wajert, Judge.

56 Feb 16, 1979: Demand of Jury Trial filed.

57 Feb 21, 1979: Pltfs' Answers to Defts' Motion for extension of time to respond to Pltfs requests for Admissions filed.

58 Feb 28, 1979: Defts; Answers and Opposition to Pltfs' Motion for Trial by Jury filed.

59 Mar 13, 1979: Defts' Answer to Pltfs' Request for Admissions filed.

60 EoDie: Defts Answers to Pltfs' 2nd set of Interrogatories filed.

61 June 1, 1979: Deposition of Maurice S. Hepps filed.

62 EoDie: Continued Deposition of Maurice S. Hepps filed.

63 EoDie: Oral Deposition of William Joseph Paulosky filed.

64 EoDie: Pltfs' Motion for partial Summary Judgment with respect to liability, or to deem certain facts to be established for purposes of trial filed.

65 EoDie: Rule of Court filed. Rule is entered on Defts to show cause why Pltfs' Motion for partial Summary Judgment with respect to liability or to determine certain facts to be established for purposes of trial should not be granted. Rule Ret. 6/11/79 S/Leonard Sugerman, Judge.

66 June 11, 1979: Defts' Answer to Pltfs' Motion for partial Summary Judgment with respect to liability or to deem certain facts to be established for purposes of trial filed.

67 June 27, 1979: Notice of deposition upon Oral Examination filed.

68 July 9, 1979: Defts' Interrogatories to Pltfs (set #3) filed.

69 EoDie: Defts Interrogatories to present the former Thrifty Beverage or Brewers Outlet stores not parties herein filed.

70 July 31, 1979: Answers to Defts Interrogatories to Pltfs' (set #3) filed.

71 EoDie: Objections to Defts' Interrogatories to Pltfs' (set #3) filed.

72 Aug 24, 1979: Court Order filed. AND NOW, upon consideration of the Memoranda of Counsel, the Pltfs' Motion for Trial by Jury is hereby granted. S/Leonard Sugerman, Judge.

EoDie: Attys — Rome, Lamb, Cantor Marion, Roda, Surkin and Rovine notified.

73 Oct 26, 1979: Court Order filed. The Motion of the Board to quash a subpoena *Duces Tecum* served upon it by the Pltfs is in part denied and in part granted. The Board is hereby ordered and directed to produce for inspection and copying by the Pltfs all forms RCB-50 or similar forms, filed by all "D" Malt Beverage Distributors in Penna. during the years 1973-1978, inclusive, subject however, to the Provisions of 65 P.S. #66.3 and

the limitations and conditions hereinafter set forth: (see Order). The said Motion to Quash is hereby granted. S/Leonard Sugerman, Judge.

EoDie: Attys — Lamb, Rome, Surkin, Rovine, Cantor, Marion and Roda notified.

74 Nov 13, 1979: Defts' Motion to compel production of Pltfs' income tax returns.

75 Nov 13, 1979: Rule to show cause filed. Rule Ret. 11/28/79 S/Per Curiam.

76 Nov 28, 1979: Pltfs' Answer to Defts' Motion to compel production of Pltfs' income tax returns filed.

77 Dec 26, 1979: Pltfs' Answers to Defts' Interrogatories # 6 & 7 filed.

78 April 3, 1980: Court Order filed. AND NOW, it is here by ordered and decreed that all Pltfs' other than Maurice Hepps and General Programming shall produce their Federal and State Income Tax returns for the years 1971 through the present time to counsel for Defts. It is further ordered and decreed that prior to such production, Pltfs shall cause to be placed the following legend, and it shall be the obligation of defense counsel to insure that access is thusly limited. S/ Leonard Sugerman, Judge.

79 April 13, 1980: Court Order filed. It is ordered and decreed that all Pltfs except Maurice S. Hepps and General Programming, Inc. shall produce their Federal & State Income Tax refunds for the years 1971 thru present, filed. S/Leonard Sugerman, Judge.

80 May 13, 1980: Pltfs Supplemental Answers to Defts Interrogatories (set #3) filed.

81 Aug 5, 1980: Defts' Motion for Summary Judgment filed.

82/82A EoDie: Memorandum in Support of Defts Motion for Summary Judgment filed. (with appendisc Vol 122)

83 EoDie: Pltfs' Memorandum in Support of its Motion for partial Summary Judgment with respect to liability or to deem certain facts to be established for purposes of Trial.

84 Aug 25, 1980: Order to place Case on Arbitration List filed.

85 Jan 6, 1981: Supplemental Answers of Deft — Phila. Newspapers, Inc. to Pltfs' request for admissions filed.

86 EoDie: Defts' Supplemental reply Memorandum in support of Motions for Summary Judgment filed.

87 Jan 9, 1981: Supplemental Answers of Deft — Phila. Newspapers, Inc. to Pltfs request for admissions filed.

88 EoDie: Defts supplemental reply memorandum in support of Motion for Summary Judgment filed.

89 Feb 6, 1981: Court Order filed. AND NOW, upon consideration of the Pltfs Motion for partial summary judgment with respect to liability or in the alternative, to deem certain facts to be established for purposes of Trial, and the Defts Motion for Summary Judgment, together with the Pleadings, Deposition, Admissions,

supporting affidavits, Memoranda of Law and Oral Arguments, the Court Orders as follows (1) the Pltfs Motion for Partial Summary Judgment with respect to liability is hereby denied, (2) The Defts' Motion for Summary Judgment is hereby denied, (3) The Pltfs' Motion to deem certain facts to be established for purposes of Trial, filed pursuant to Pa. R.C.P. #1035(c) is denied except as follows; (a) The five newspaper articles which appeared in the Corporate Defts' Newspaper, The Phila. Inquirer on 5/5/75, 9/15/75, 1/16/76, 2/5/76 and 5/2/76, and all statements contained therein, were "published" by the said Corporate Deft to third persons, and shall be deemed so for purposes of Trial; the five said newspaper articles, and the statements contained therein, of which the Pltfs Complain, are capable of defamatory meaning with respect to the Pltfs(c) The Pltfs for the purpose of the within action are private and public figures, (d) as private figures the Pltfs must prove by a preponderance of the evidence, that the Defts were negligent in publishing the allegedly false states of which, the Pltfs complain in addition to proving the remaining elements of their action. S/Leonard Sugerman, Judge.

Feb 6, 1981: Attys—Rome Lamb, Cantor, Marion, Roda, Surkin & Rovine notified.

90 Mar 23, 1981: Plt's 2nd supplemental answers to Deft's interrogatories (third set).

SUPREME COURT OF PENNSYLVANIA

2/23/83	Notice of Appeal Docketed.
10/25/83	Original record filed.
7/15/83	Appellants' Application for Advancement of Argument, filed.
7/28/83	Appellees' Answer and New Matter, filed.
8/15/83	ORDER: APPLICATION DENIED. BY THE COURT: s/SAMUEL J. ROBERTS, C.J., MR. JUSTICE McDERMOTT DID NOT PARTICIPATE IN THIS MATTER.
12/13/83	Appellees' Designation of Additions to Reproduced Record, filed.
3/22/84	Appellees' Motion for Disqualification of the Honorable Rolf R. Larsen and the Honorable James T. McDermott, filed.
4/9/84	ARGUED — J.66
4/19/84	ORDER: (Disqualification) DISMISSED AS MOOT. s/Nix, C.J.
12/14/84	**DECISION:** THE ORDER OF THE TRIAL COURT IS REVERSED AND A NEW TRIAL IS AWARDED. THE NEW TRIAL WILL BE CONFINED TO A DETERMINATION OF DEFENDANT'S LIABILITY AND THE ASSESSMENT OF COMPENSATORY DAMAGES IF THE LIABILITY ISSUE IS DECIDED IN FAVOR OF THE PLAINTIFF. NIX, C.J. MR. JUSTICES LARSEN AND McDERMOTT DID NOT PARTICIPATE IN THE CONSIDERATION AND DECISION OF THIS CASE.
12/14/84	Judgment Entered
12/31/84	REMITTED.
3/14/85	Appellant's Notice of Appeal to Supreme Court of the United States, filed.
6/27/85	Certified copy of order of U.S. Supreme Court noting probable jurisdiction, filed.

COMPLAINT
COURT OF COMMON PLEAS
HEPPS et al. v. PHILADELPHIA NEWSPAPERS, INC. et al.

[Formal Matter Omitted in Printing]

1. Plaintiff, Maurice Hepps ("Hepps"), is an individual residing at Johnny's Way, Westtown, Pennsylvania. Hepps was the president and chief executive officer of General Programming, Inc., and is currently its major stockholder.

2. Plaintiff, General Programming, Inc. ("GP") is a Pennsylvania business corporation with its principal place of business located at P.O. Box 137, Furnace Grove, Minersville, Pennsylvania, and is engaged in part in the real estate and franchising business in various counties in the Commonwealth of Pennsylvania. GP is the owner of the trademarks "Thrifty Beverage," and "Brewers' Outlet," which are utilized in connection with its franchising operation, and is and has been commonly known as "Thrifty," "Thrifty Beverage," the "Thrifty Chain" and "Brewers' Outlet."

3. All plaintiffs listed in the foregoing caption, other than Hepps and GP, are Pennsylvania corporations, or, in the case of William D. Pleva, a sole proprietorship, doing business as beer and soda distributorships at the addresses listed under their names in the caption. These plaintiffs are hereinafter referred to as "Store Owners." Each Store Owner has been doing business at its respective location since on or before May 5, 1975 under a management, licensing and consulting agreement with GP, thereby being known to the public throughout that period as part of the "Thrifty Chain."

4. Defendant Philadelphia Newspapers, Inc. ("PNI") is a corporation engaged in part in publishing the Philadelphia Inquirer ("Inquirer"), a daily morning newspaper with an approximate daily readership of 2,000,000 persons, residing predominantly in the Commonwealth of Pennsylvania, including Chester County, in the southern portion of the State of New Jersey, and the northern portion of the State of Delaware.

5. Defendants William Ecenbarger ("Ecenbarger") and William Lambert ("Lambert") are employed by PNI as reporters for the Inquirer.

COUNT I
PLAINTIFFS v. PNI AND ECENBARGER

6. The allegations of paragraphs 1-5 are incorporated herein by reference.

7. On or about May 5, 1975, defendants PNI and Ecenbarger caused to be published in the Inquirer an article headlined "HOW MAZZEI USED PULL, KEPT BEER CHAIN INTACT," a copy of which is attached hereto, marked Exhibit "A", and made part hereof.

8. The article, and its headlines, state and imply that former State Senator Frank Mazzei, a convicted felon, and certain members of the "Cosa Nostra," had a hidden financial interest in plaintiffs' operations; that "the State Liquor Control Board ordered [the Thrifty chain] disbanded three years ago"; and that plaintiffs had used improper political influence to negate the effects of this decision.

9. The above statements and implications were false, and PNI and Ecenbarger either knew or should have known at the time of publication that they were false.

10. The above statements and implications constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

11. Despite demand, PNI and Ecenbarger have failed and refused and continue to fail and refuse to retract their libellous and defamatory statements, with the exception of a single retraction, a copy of which is attached hereto, marked Exhibit "B", and made part hereof.

12. The above statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation; (b) expose him and him family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

13. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will

compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish PNI and Ecenbarger for their malicious libels, and will deter them from repetition of similar libels in the future.

14. The above statements have severely injured each plaintiff other than Hepps in that they have tended to (a) blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

15. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants PNI and Ecenbarger, jointly and severally, on Count I, for damages in excess of $10,000.00, plus punitive damages and costs of suit.

COUNT II

PLAINTIFFS v. PNI AND ECENBARGER

16. The allegations of paragraphs 1-5 and 7-15 are incorporated herein by reference.

17. On or about September 15, 1975, defendants PNI and Ecenbarger caused to be published in the Inquirer an article headlined "WHILE SHAPP'S OFF CAMPAIGNING, INVESTIGATIONS HEAT UP AT HOME," a copy of which is attached hereto, marked Exhibit "C", and made part hereof.

18. The article states in part:

> "Federal authorities are investigating the Thrifty Beverage chain of beer distributorships, *which has won a series of competitive advantages through rulings by the State Liquor Control Board. The investigators have found connections between Thrifty and underworld figures. A major Thrifty backer is former State Sen. Frank Mazzei. . . .*" (emphasis added).

19. The underscored statements were false, and PNI and Ecenbarger either knew or should have known at the time of publication that they were false.

20. The underscored statements constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

21. Despite demand, PNI and Ecenbarger have failed and refused and continue to fail and refuse to retract these libellous and defamatory statements.

22. The underscored statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation; (b) expose him and his family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

23. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish PNI and Ecenbarger for their malicious libels, and will deter them from repetition of similar libels in the future.

24. The underscored statements have severely injured each plaintiff other than Hepps in that they have tended to (a)

blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

25. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants PNI and Ecenbarger, jointly and severally, on Count II, for damages in excess of $10,000.00, plus punitive damages and costs of suit.

COUNT III

PLAINTIFFS v. PNI, ECENBARGER AND LAMBERT

26. The allegations of paragraphs 1-5, 7-15, and 17-25 are incorporated herein by reference.

27. On or about January 16, 1976, defendants caused to be published in the Inquirer an article headlined "BEER CHAIN PROBED FOR MAFIA TIE," a copy of which is attached hereto, marked Exibit "D", and made part hereof.

28. The article states and implies that plaintiffs had used improper political influence to negate the effects of a court ruling allegedly ordering the Thrifty chain disbanded, and that they had ties to the Mafia.

29. The above statements and implications were false, and defendants either knew or should have known at the time of publication that they were false.

30. The above statements and implications constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

31. Despite demand, defendants have failed and refused and continue to fail and refuse to retract their libellous and defamatory statements.

32. The above statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation; (b) expose him and his family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

33. Because of defendants' malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

34. The above statements have severely injured each plaintiff other than Hepps in that they have tended to (a) blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and a lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

35. Because of defendants' malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants, jointly and severally, on Count III, for damages in excess of $10,000.00, plus punitive damages and costs of suit.

COUNT IV

PLAINTIFFS v. PNI AND ECENBARGER

36. The allegations of paragraphs 1-5, 7-15, 17-25 and 27-35 are incorporated herein by reference.

37. On or about February 5, 1976, PNI and Ecenbarger caused to be published in the Inquirer an article headlined "INSURER, CRIME LINK PROBED BY U.S. JURY," a copy of which is attached hereto, marked Exhibit "E", and made part hereof.

38. The article states in part:

> "Federal agents have evidence of direct financial involvement in Thrifty by [Joseph] Scalleat [a leader in organized crime], and Scalleat's nephew is involved in a Thrifty distributorship.
>
> * * *
>
> "... former State Senator Frank Mazzei, who was a behind-the-scene Thrifty backer. ...
>
> * * *
>
> "The Thrifty chain ... has survived because several favorable decisions by the liquor board.
>
> * * *
>
> "The Pennsylvania Securities Commission is investigating the transfer of Thrifty stock to Hulse. The transfer occurred despite a 1969 commission rejection of Thrifty's request to sell stock publicly."

39. These statements were false and PNI and Ecenbarger either knew or should have known at the time of publication that they were false.

40. These statements constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

41. Despite demand, PNI and Ecenbarger have failed and refused and continue to fail and refuse to retract these libellous and defamatory statements.

42. These statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation;

(b) expose him and his family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

43. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish PNI and Ecenbarger for their malicious libels, and will deter them from repetition of similar libels in the future.

44. These statements have severely injured each plaintiff other than Hepps in that they have tended to (a) blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

45. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants PNI and Ecenbarger, jointly and severally, on Count IV, for damages in excess of $10,000.00, plus punitive damages and costs of suit.

COUNT V

PLAINTIFFS v. PNI AND LAMBERT

46. The allegations of paragraphs 1-5, 7-15, 17-25, 27-35 and 37-45 are incorporated herein by reference.

47. On or about May 2, 1976, PNI and Lambert caused to be published in the Inquirer an article headlined "HOW STATE OFFICIALS TOYED WITH INSURANCE FIRM," a copy of which is attached hereto, marked Exhibit "F," and made part hereof.

48. The article states in part:

> "Wisconsin Surety had been linked to the Thrifty Beverage beer chain, which in turn had connections itself with organized crime."

49. These statements were false and PNI and Lambert either knew or should have known at the time of publication that they were false.

50. These statements constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

51. Despite demand, PNI and Lambert have failed and refused and continue to fail and refuse to retract these libellous and defamatory statements.

52. These statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation; (b) expose him and his family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

53. Because of PNI's and Lambert's malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish PNI and Lambert for their malicious libels, and will deter them from repetition of similar libels in the future.

54. These statements have severely injured each plaintiff other than Hepps in that they have tended to (a) blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

55. Because of PNI's and Lambert's malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of $10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants PNI and Lambert, jointly and severally, on Count V, for damages in excess of $10,000.00, plus punitive damages and costs of suit.

[Subscriptions and Exhibits omitted in printing]

DEFENDANT'S ANSWER AND NEW MATTER
COURT OF COMMON PLEAS

[Caption omitted in printing]

Defendants Philadelphia Newspapers, Inc., William Ecenbarger and William Lambert are advised that no responsive pleading is required to the averments of plaintiffs' Complaint and that said averments are deemed at issue and denied pursuant to Pa. R.C.P. 1045(a), except it is admitted that defendant Philadelphia Newspapers, Inc. ("PNI") is a corporation engaged in part in publishing *The Philadelphia Inquirer,* and that defendants Ecenbarger and Lambert are employed by PNI as reporters for *The Inquirer,* but it is denied that defendants Ecenbarger and Lambert caused to be published the articles complained of in paragraphs 7, 17, 27, 37 and 47 of plaintiffs' Complaint, and to the contrary it is averred that the articles referred to in the aforesaid paragraphs were published by defendant PNI.

New Matter

16. The Complaint fails to state a claim upon which relief can be granted.

17. The publications complained of are protected speech and privileged under the First and Fourteenth Amendments to the Constitution of the United States and under the Constitution and laws of the Commonwealth of Pennsylvania.

18. The publications complained of constituted fair and accurate reports of the activities and conduct of public officials and public figures, and accordingly are constitutionally privileged under the standard set forth in NEW YORK TIMES CO. v. SULLIVAN, 376 U.S. 255 (1964).

19. The publications complained of constituted fair and accurate reports of judicial, administrative and governmental activities and proceedings, and accordingly are privileged.

20. The publications complained of reported highly newsworthy matters and events of legitimate and substantial public interest and concern, and were reasonable and justified.

21. The publications complained of reported matters of public record and accordingly are privileged.

22. The publications complained of were written and published based upon reliable sources, in good faith, without malice, on proper occasion and with proper motives, in the belief that the facts set forth therein were true and without any reason to doubt their truth.

WHEREFORE, defendants Philadelphia Newspapers, Inc., William Ecenbarger and William Lambert pray that the Complaint be dismissed at the cost of plaintiffs.

[Subscriptions omitted in printing]

REPLY TO NEW MATTER
COURT OF COMMON PLEAS

[Caption omitted in printing]

16-21. The allegations of these paragraphs constitute conclusions of law to which no responsive pleadings are required.

22. Denied. It is denied that defendants had no reason to doubt the truth of the publications complained of in the Complaint. On the contrary, defendants knew or had reason to know that the publications complained of were false. As to the remaining averments of this paragraph, after reasonable investigation, plaintiffs are without knowledge or information sufficient to form a belief as to the truth thereof, and they are therefore denied. Strict proof is demanded at trial, if material.

[Subscriptions omitted in printing]

OPINION
COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA
HEPPS v. PHILADELPHIA NEWSPAPERS, INC.

SUGERMAN, J., March 16, 1977—The case before us requires a response to a novel and important question: May a plaintiff in a libel action against a newspaper obtain pretrial discovery of notes made by a reporter while interviewing informants in the course of preparation of a series of news articles thereafter published and allegedly libelous? The question presents an issue of first impression in Pennsylvania.

From the complaint we observe that Maurice Hepps, the individual plaintiff, is the principal stockholder of the corporate plaintiff, General Programming, Inc. ("General"). The latter entity owns the trademarks "Thrifty Beverage" and "Brewer's Outlet," and licenses such marks, and provides management and consultation services to licensees. The remaining corporate and individual plaintiffs ("Thrifty Beverage"), some 19 in number, are allegedly licensees of General and engaged in the business of distributing beer and soda in Pennsylvania.

The corporate defendant, Philadelphia Newspapers, Inc. ("PNI"), publishes the Philadelphia Inquirer, a newspaper of general circulation[1] in the Delaware Valley. The individual defendants, William Ecenbarger ("Ecenbarger"), and William Lambert ("Lambert"), are employed by PNI as news reporters.

In their capacity as reporters, Ecenbarger and Lambert prepared a series of articles, later published in the Inquirer, concerning Hepps, General and Thrifty Beverage. The articles endeavor to connect Hepps, General and Thrifty Beverage to certain named "underworld" figures, and organized crime in general. As one such example, in an article published in the Inquirer on May 5, 1975, under the byline of Ecenbarger and bearing the headline: "HOW MAZZEI USED PULL, KEPT BEER CHAIN INTACT," the reporter asserts

1. Act of May 16, 1929, P.L. 1784, sec. 3, as amended, 45 P.S. §3(4).

that former State Senator Frank Mazzei, described variously as a convicted felon and an extortionist, used improper influence or "political muscle" to subvert a ruling of the Pennsylvania Liquor Control Board. The article further asserts that while there is no visible financial link between Mazzei and Thrifty Beverage, " . . . there is a clear pattern of interference in state government by Mazzei on behalf of Hepps and Thrifty." Finally, in the same article, Ecenbarger reports that "Mazzei has several underworld associates, one of which is Joseph Scalleat of Hazleton, who is described by the State Crime Commission as a Cosa Nostra leader. . ." and that ". . . Scalleat's wife[2] is a licensed Thrifty distributor in Bucks County."

Alleging the libelous character of such articles, the individual and corporate plaintiffs filed their complaint in trespass against defendants on May 4, 1976.[3]

On May 12, 1976, plaintiffs moved for inspection of documents pursuant to Pa. R.C.P. 4009. On the same day, the court, by the Honorable John M. Wajert, ordered defendants to produce the requested documents for inspection by plaintiffs, but vacated its order on June 1, 1976, so as to permit defendants to file an answer to plaintiffs' motion for inspection. Such answer was filed on June 21, 1976, and admitted possession of the requested documents, but asserted that the same were irrelevant to plaintiffs' cause, plaintiffs' request was made in bad faith, and production would be burdensome and oppressive to defendants. In new matter, defendants claim the news reporter's statutory privilege as to those documents that might suggest or reveal the "sources of defendants' articles."

Although not required to do so, defendants thereafter answered plaintiffs' complaint, admitting the employment of

2. Later corrected by the Inquirer to read "sister-in-law." See Exhibit B to plaintiffs' complaint.

3. A corporation may, of course, recover in an action grounded on defamation: Cosgrove Studio & Camera Shop v. Pane, 408 Pa. 314, 182 A.2d 751 (1962).

Ecenbarger and Lambert by PNI, and the publication of PNI of the allegedly offending articles. In new matter, defendants assert a series of defenses to plaintiffs' libel action, including truth, fair and accurate reporting on the conduct of public officials and public figures, and publication in good faith, without malice, based upon reliable sources. Plaintiffs replied to the new matter, denying the factual allegations contained therein.

ISSUES

As later refined and narrowed by the parties, plaintiffs' motion for production of documents seeks discovery of notes and memoranda made by reporters Ecenbarger and Lambert in the course of interviews conducted while preparing the articles ultimately published by the Inquirer. Defendants have refused to produce such materials, contending that the same will reveal confidential sources or may lead to the discovery or revelation of such sources, and that such materials are, therefore, privileged under the Pennsylvania statute according newsmen the privilege of nondisclosure of sources of information, and thus not a proper subject of discovery as provided in Pa. R.C.P. 4011(c).

Plaintiffs' motion for production also demands inspection of "[a]ll documents [in the possession or control of defendants] concerning the performance of either individual defendant in the course of his employment with the Philadelphia Newspapers, Inc."

Defendants refuse to produce such documents on the several bases that such records are irrelevant to plaintiffs' cause, are "confidential and highly personal records," and plaintiffs' request is designed to "harass and annoy" defendants.

Lastly, plaintiffs' motion seeks production of "all articles published in The Philadelphia Inquirer authored [sic] by William Ecenbarger or William Lambert, either individually or jointly with any other person." Defendants refuse plaintiffs' latter request, as well, contending that such articles are, again, irrelevant to plaintiffs' cause, and that the request is

made in bad faith with the intent to require an unreasonable investigation and cause unreasonable annoyance, expense and oppression. We treat the issues so defined seriatim.

(1) Reporters' Notes

We consider first the more difficult issue before us, and the matter most vigorously and ably argued by the parties.

Following argument but prior to submission of the instant motion for decision, defendants responded to plaintiffs' first set of interrogatories and in their answers, defendants disclosed the identity of 15 sources of information. As a result, although plaintiffs' requests for production are broadly phrased,[4] the parties have narrowed and limited the issue for decision to the matter of the production of notes made by defendant reporters in the course of interviews with various informants while preparing the allegedly libelous articles for publication. The parties agree that the notes are of two classes: (1) Notes of interviews with disclosed informants which do not reveal and cannot lead to the revelation of the identity of confidential informants, and (2) notes of interviews with both disclosed and confidential informants which either reveal, or might lead to the revelation of, the identity of confidential informants.

Defendants resist production of notes of both classes on four grounds: (1) The notes are protected from discovery, or "privileged" under the First Amendment to the Constitution of the United States; (2) plaintiffs' motion is premature; (3) the notes are protected from discovery under a "thought process privilege," available to news editors and presumably investigative reporters; and (4) the notes are protected from discovery under the privilege accorded news media personnel by the Pennsylvania statute permitting the nondisclosure of sources of information. In view of our disposition, we need treat only the last of these.

As Professor Wigmore has observed, the mere fact that a communication between a journalist and an informant was

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4. See plaintiffs' motion for production, pars. 1-5, 7, 8.

made in express confidence, or in the implied confidence of a confidential relation does not create a privilege of non-disclosure at common law: 8 Wigmore §2286 (McNaughton rev. 1961):

"This common law rule is not questioned today. No pledge of privacy nor oath of secrecy can avail against demand for truth in a court of justice. Accordingly, in the absence of a statute to the contrary, a confidential communication ... to a ... journalist ... is not privileged from disclosure." Id. at 528, 529, 530.

Nor does it appear that there is an absolute constitutional testimonial privilege permitting nondisclosure of sources accorded to news reporters under the First Amendment or the Constitution of Pennsylvania. See, for example: Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed. 2d 626 (1972) (grand jury proceedings); Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910, 79 S. Ct. 237, 3 L.Ed. 2d 231 (1958) (libel action); Taylor and Selby Appeals, 412 Pa. 32, 40, 193 A.2d 181, 184 (1963).

As a consequence, the legislature of Pennsylvania created a testimonial privilege permitting news reporters and other media personnel to refuse to disclose sources of information.[5] It is this statute upon which defendants rely in their refusal to produce reporters' notes.

The privilege of nondisclosure was created by the Act of June 25, 1937, P.L. 2123, sec. 1, as amended December 1, 1959, P.L. 1669, sec. 1, and July 31, 1968, P.L. 858, sec. 1, 28 P.S. §330, and it provides, in pertinent part:

"No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or any press association or any radio or television station, or any magazine of general circulation, for

5. The legislature has statutorily extended the privilege of non-disclosure to communications between spouses (28 P.S. §316); attorney and client (28 P.S. §321); physician and patient (28 P.S. §328); clergyman and penitent (28 P.S. §331); and accountant and client, Act of May 26, 1947, P.L. 318, as amended, 63 P.S. §9.11(a).

the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, before any commission, department, or bureau of this Commonwealth, or before any county or municipal body, officer, or committee thereof."

The statute and its scope have been construed and interpreted in only one appellate decision in Pennsylvania: Taylor supra, before the Supreme Court of Pennsylvania as the result of orders of a lower court adjudging Robert L. Taylor, General Manager of the Evening and Sunday Bulletin, and Earl Selby, City Editor of the same publication, in contempt. Because of the importance of the decision to our task, we set out the facts at length.

In preparation for an investigating grand jury, to be convened in November 1962 for the purpose of investigating corruption in city government, an assistant district attorney of Philadelphia, in February 1962, interviewed one John Fitzpatrick.

On December 30, 1962, the Bulletin published an article entitled "Fitzpatrick's Secret Talk to D. A. is Bared." The article consisted principally of questions put to and answers made by Fitzpatrick at the February interview with the assistant district attorney. The article also referred to the end of the interview when the assistant district attorney said that he would review the record for further questions, and the article then added: *"However, much of the subsequent questioning dealt with what John Fitzpatrick had told Bulletin reporters."*

In January, 1963, a subpoena duces tecum was served upon Taylor and Selby, directing them to appear before the investigating grand jury and bring with them:

"(a) 'All tape recordings, written statements, Memoranda of interviews, conversations, conferences had with John J. Fitzpatrick'; and (b) 'All copies of statements given by John J. Fitzpatrick to the District Attorney [footnote omitted] on Feb-

ruary 20, 1962, portions of which appeared in the Philadelphia Evening Bulletin on December 30, 1962;' and (a) 'all tape recordings of conferences, interviews, discussions, interrogations or conversations with John Fitzpatrick'; (b) 'all memorandum, notes, reports and other documents of or pertaining to conferences, interviews, discussions, interrogations or conversations with John Fitzpatrick'; (c) 'all memorandum, notes, reports and other documents of or pertaining to investigations conducted as a result of information furnished by John Fitzpatrick'; (d) 'all records of expenses incurred directly or indirectly in gathering information from, or conducting conferences, investigations, discussions, interrogations or conversations with John Fitzpatrick'; (e) 'all documents of or pertaining to the examination of John Fitzpatrick by polygraph, examiners, physicians, psychologists or other experts'; and (f) 'any and all other documents of or pertaining to John Fitzpatrick'." Id. at 35, 193 A.2d at 182.

Taylor and Selby appeared before the grand jury but refused to answer certain questions and refused to produce the materials requested by the subpoena, claiming the statutory privilege as the basis for such refusal. When brought before the lower court, Taylor and Selby again refused to answer the questions or produce the materials and were thereupon adjudged in contempt, the court holding that the Act of 1937 protects a newsman only against the compulsory disclosure of the identity of *persons* and does not protect against the compulsory disclosure of documents or other inanimate materials. In its order, the lower court also held:

"(1) that appellants were *not* required to produce an alleged copy of statements made by John Fitzpatrick to the District Attorney's office on February 20, 1962 and set forth in part in The Bulletin on December 30, 1962, since, inter alia, the result might be to disclose the identity of the transmitter of the alleged copy to The Bulletin; (2) that appellants were *not* required to produce memoranda, notes, reports and other documents of or pertaining to investigations conducted by The Bulletin as a result of information furnished by John Fitzpatrick, since such investigations, made on leads furnished by Fitzpatrick, would doubltless encompass confidential interviews with other persons who would give information only if their identity were kept secret; (3) that appellants were *not* required to produce the results of alleged polygraph (lie-detector) tests given to Fitzpatrick since, inter alia, this would reveal the identity of the experts who conducted such tests; *but (4) that appellants were required to produce documents and tape recordings allegedly evidencing what John J. Fitzpatrick had told Bulletin reporters, ...*" Id. at 37-8, 193 A.2d at 183. (Emphasis in original and supplied).

The lower court directed Taylor and Selby to produce the documents and tape recordings of Fitzpatrick's interview with Bulletin reporters, as, in its view, the Bulletin had waived the privilege created by the statute by publishing the single sentence quoted, supra: "However, much of the subsequent questioning dealt with what John Fitzpatrick had told Bulletin reporters." The lower court also directed Taylor and Selby to answer certain questions concerning such material.

Taylor and Selby appealed the orders adjudging them in contempt, and as the issues were framed in the Supreme Court, the questions to be answered on appeal were (1) whether Taylor and Selby, without regard to waiver, might have properly exercised the statutory privilege in refusing to produce documents and tape recordings prepared by them evidencing the statements Fitzpatrick made to them, and (2) if they might properly have exercised the privilege, had they nevertheless waived it by publishing the single sentence quoted above?

In an opinion representing the views of six of the seven members of the court, Chief Justice Bell reversed the orders of contempt and at the same time held (1) the word "source" means not only the identity of persons, but also includes documents, inanimate objects and all sources of information; (2) while a news reporter may indeed waive the privilege granted by the act, such waiver extends only to statements of an informant actually published, and the statute must be liberally construed in favor of the news media.

The two-pronged holding of Taylor, when considered in the context of the facts upon which it was based, may be narrowly stated thusly: The word "source," used in the phrase "source of any information" as it appears in the statute, includes, in addition to the identity of persons who are sources of information, all other sources of information as well, and although the privilege accorded by the statute may be waived, the extent of a waiver is limited to that portion of the source's statement as is actually published.

Plaintiffs here might argue, but wisely decline, that there is a substantive distinction between tapes and documents containing the statements of an animate source, as actually verbalized by such person,[6] and notes and memoranda prepared by a reporter in the course of interviewing an animate source. Certainly, there is some logic in the suggestion that notes made by a reporter during the course of an interview with a disclosed informant, and particularly notes that admittedly do not reveal the identity of undisclosed informants, are not "sources" under the Taylor definition.[7] This suggestion simply equates the word "source" with the word "origin," and adds that even if Taylor permits the nondisclosure of unpublished portions of a disclosed informant's statements, such other information contained in the notes which, by admission, does not reveal the identity of confidential informants, animate or inanimate, is not privileged.

However, we do not read Taylor so narrowly. In the first instance, as the court there noted:

"If a Court can select or direct newsmen ... to select or delete what information is disclosed by the informer ... the

6. Although there is no indication in Taylor that documents "allegedly evidencing what John J. Fitzpatrick had told Bulletin reporters" as ordered to be produced by the lower court contained only the words of Fitzpatrick.

7. One can cite examples of documents more validly characterized as sources than are reporter's notes. For example, the files surreptitiously photographed during the burglary of the office of Dr. Ellsberg's psychiatrist clearly fit the Taylor definition as an inanimate or documentary source. The notes made by a reporter while examining those files would appear to present an issue similar to ours.

object and the intent of the Act will be *realistically* nullified." Id. at 43-4, 193 A.2d at 186. (Emphasis in original).

The court appeared to be concerned that the revelation of the questions and answers contained in the undisclosed portion of the Fitzpatrick interview might have also revealed the identity of other sources. Id. at 43-4, 193 A.2d at 186.

Secondly, we must view plaintiffs' request at bar with the precept in mind that Taylor requires a broad and liberal construction of the act, in favor of nondisclosure.

Thirdly, and most obviously, Taylor holds that regardless of the reason, a reporter need not disclose those portions of an informant's statement, whether or not the identity of the informant is disclosed. It is fair to assume that the notes and memoranda prepared by defendants Ecenbarger and Lambert in the course of interviews with informants contain such statements.

It must also be noted that if we apply the principle of statutory construction enunciated in Taylor, *all* notes made by reporters relating to the subjects of articles, regardless of the nature of the contents, are privileged and need not be disclosed or produced. To hold otherwise might well require that we select or delete, or direct newsmen to select or delete, information contained in such notes, the very act on our part effectively prohibited by Taylor.

To hold otherwise would also require a strict and narrow interpretation of the act, directly contrary to the liberal and broad interpretation mandated by Taylor.

Plaintiffs, in recognition of at least the facial authority of Taylor, and the scope of the privilege accorded by the act as apparently including the instant notes, argue that, although the notes here sought may be privileged in another setting, defendants by pleading the defenses of good faith and reliability of source have thereby waived the privilege of nondisclosure of sources. How, ask plaintiffs, rehetorically, can defendants assert as a defense that the sources upon which they relied were reliable, and, at the same time, refuse to reveal the identity of such sources, with the result that reliabil-

ity or the lack of reliability can never be determined by a fact finder.[8]

While Taylor does not answer the specific question, it does offer some direction. Our interpretation of the holding leads us inevitably to conclude that the privilege as described in Taylor is well nigh absolute and is not waived by the act of pleading the defenses of reliability or good faith. Such an interpretation accords with the broad and liberal construction of the act as required by Taylor.

It may also be argued, although plaintiffs do not, that in Taylor, the court narrowly construed a waiver because of its concern that the identity of undisclosed sources might well have been revealed had the unpublished portion of Fitzpatrick's statement been disclosed: "Judge Kelley based his ruling principally if not solely on his conclusion that the Bulletin had waived the privilege created by the Act of 1937 by publishing in its aforesaid article on December 30, 1962, the single sentence hereinabove quoted: 'However, much of the subsequent questioning dealt with what John Fitzpatrick had told Bulletin reporters.' *This obviously gave Fitzpatrick as the leading source, but the identity of many other persons may have been revealed in the questions and/or the answers.*" Id. at 43, 193 A.2d at 186. (Emphasis supplied.)

Such concern appears to be at the core of the court's view on the subject of waiver. However, in the face of the clear and succinct holding that follows expression of the court's concern: "We therefore hold that a waiver by a newsman applies only to the statements made by the informer which are actually published or publicly disclosed [footnote omitted] and not to other statements made by the informer to the newspaper." Id. at 44, 193 A.2d at 186, we must assume that the limitation on waiver so expressed applies to unpublished statements regardless of whether other sources might be revealed.

In the alternative, plaintiffs argue that if the privilege fa-

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8. The question, of course, as posed by plaintiffs also focuses upon the historically competing interests of a free press on the one hand and redress for defamation on the other.

cially applies to the notes at bar, and we find no waiver, then this court should carve an exception into the act in the case of libel actions. Unless we do, plantiffs contend, the act becomes a sword, rather than a shield, to be wielded by and at the whim of unscrupulous newsmen against defamed plaintiffs.

We respond by noting the act itself admits of no exceptions. Were we to create one, we would thereby engraft language onto the act not now apparent. This we may and will not do. Nor does Taylor admit of such an exception. Again, Taylor, at least to us, establishes the privilege against disclosure as absolute. If indeed an exception is to be carved, the blade should be wielded by the tribunal that espoused the principle, and not the trial court.

Plaintiffs argue, to the contrary, that (1) Taylor concerned a grand jury proceeding and not a libel action, and should not, therefore, be applied at bar, as the two proceedings present entirely different considerations; (2) the information sought by plaintiffs goes to the "heart" of their case and should, therefore, be disclosed; and (3) the legislative purpose of the statute creating the privilege would not be served by permitting defendants to avail themselves of its benefits in a libel action.

All such arguments find some support in the cases cited by plaintiffs, and we examine them in moderate detail, discussing plaintiffs' arguments as we do.

Plaintiffs first direct us to three decisions of the appellate courts of New Jersey. In the earliest of these, State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943), several public officials contended that indictments returned against them by a grand jury were politically motivated. The Supreme Court of New Jersey appointed a commissioner to investigate the allegation, and in the course of the investigation, the county prosecutor called before the commissioner editors of several Hudson County newspapers who were questioned by the commissioner. One of the questions posed to the editors asked the name of the person who conveyed certain press releases to the editors, the newspapers having published the press releases and the names of the persons who had prepared them. The editors declined to reveal the name of the "conduit," as-

serting the statutory privilege accorded newsmen in New Jersey. The statute, similar to the Pennsylvania statute, provided:

"No person engaged in, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceeding or trial, before any court, before any grand jury of any county or any petit jury of any court, before the presiding officer of any tribunal or his agent, or before any committee of the legislature, or elsewhere, *the source of any information* procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed." N.J.S.A. 2: 97-11, as cited in 129 N.J.L. 485. (Emphasis supplied.)

The Supreme Court of New Jersey, in its disposition, noted first that under the law of New Jersey, statutes in derogation of the common law are to be *strictly* construed, and New Jersey courts are not to infer that the legislature intended to alter the common law further than the case requires.

So saying, the court, construing the word "source" as used in the statute strictly, ordered the editors to reveal the name of the conduit through whom the press releases had passed, as such person was not a "source" of information, but merely the messenger who communicated the press releases from the source to the newspaper.

"We conclude that the question did not go to the source of the publication, wherefore the statute does not, in terms, apply . . ." Id. at 487, 30 A.2d at 426.

It is important to note that strict construction of the word "source," and the statute generally, was and continues to be mandated by New Jersey law, as the statute is in derogation of the common law. In contradistinction to that principle, however, the Statutory Construction Act in Pennsylvania provides: "The rule that statutes in derogation of the common law are to be strictly construed, shall have *no* application to the statutes of this Commonwealth . . ." Act of November 25, 1970, P.L. 707, added December 6, 1972, P.L. 1339, sec. 3, 1 Pa. C.S.A. §1928(a). (Emphasis supplied). Accordingly, we are not

persuaded that Donovan supports plaintiffs' position at bar in any respect.

Following Donovan, the Supreme Court of New Jersey decided Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956). In Brogan, plaintiff, a city councilman and candidate for reelection, sued a newspaper for both compensatory and punitive damages as the result of the publication of an allegedly libelous article. The newspaper defended on the basis that: (1) The article was not libelous; (2) the newspaper published the article in good faith and with a reasonable belief in the truth of the article; (3) a retraction had been published; and (4) the article constituted fair comment on the subject and was published without malice.

The trial court ruled that defendant's sources were privileged under the New Jersey statute and, as a result, the jury did not impose punitive damages upon defendant newspaper.

The Supreme Court, reversing, awarded plaintiff a new trial and held that when a newspaper as a defendant in a libel action raises the defenses of fair comment and good faith, and its witnesses testify that its sources were reliable, the newspaper thereby waives the privilege of nondisclosure of sources afforded by the statute and may be properly cross-examined on the subject of such sources. In so holding, the court noted, generally:

"The position of the [reporter-witnesses] in this case is that they insist on asserting these defenses based upon the reliability of the source of information upon which they relied, yet refuse to disclose what those sources were, so that the jury could ascertain whether they were in fact reliable." . . .

"The defendant cannot invoke the statutory privilege to render conclusive their own evaluation of the character and quality of the source. This is basic to due process . . . The statute has no such sweep. It was not designed to reach this situation." Id. at 152, 123 A.2d 480-81.

One can find little fault with the logic implicit in the reasoning of the New Jersey court, adopted and advanced by plaintiffs at bar. Why indeed should a newspaper be permitted to advance as a libel defense the reliability of sources and

at the same time refuse to identify such sources? On the Federal level, the problem thus presented has been ably articulated in a recent opinion by Judge Haight, of the United States District Court for the Southern District of New York[9]:

"I conclude that a 'public figure' plaintiff in a defamation action is entitled to liberal interpretation of the rules concerning pre-trial discovery. I intimate no view on the merits of the present case; but one cannot close one's eyes to the possibility of malicious publications or statements concerning public figures. If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result." Herbert v. Lando, 45 U.S.L.W. 2354 (February 1, 1977) (U.S.D.C.S.D.N.Y., January 4, 1977).

In Brogan, the Supreme Court of New Jersey was once again called upon to construe the New Jersey statute according the newsman's privilege, and once again, applying the rule of strict construction of statutes in derogation of the common law, limited the application of the privilege. Again, we are under no such constraint and Taylor obviously adopts the contrary view.

Plaintiffs next point to and rely heavily upon Beecroft v. Point Pleasant Printing & Publishing Co., 82 N.J. Super. 269, 197 A.2d 416 (1964), a case similar on its facts to the matter at hand. Plaintiff, Police Chief of Point Pleasant, N.J., sued for compensatory and punitive damages as the result of an allegedly libelous editorial published in defendant's newspaper. The newspaper defended upon the grounds, inter alia, that the editorial was published in good faith without malice, and that the editorial was within the bounds of fair comment on

9. The case also considers at length the perimeters of pretrial discovery in civil libel actions under the Federal rules.

the subject. The matter before the Superior Court of New Jersey concerned defendant newspaper's motion to strike several of plaintiff's pretrial interrogatories which asked defendant to disclose the facts upon which the editorial was based, and the identity of the sources of those facts. The newspaper refused disclosure on the basis of the statutory privilege.

The court noted first that the New Jersey legislature, after the decisions in Donovan and Brogan, had amended the statute by expanding the scope of the word "source," presumably to circumvent the Donovan decision, and to include the messenger or means of transmitting the information, but although aware of the decision in Brogan, did nothing to grant relief to newspapers from the mandate of Brogan.

The court next concluded that in its view, the legislative intent underlying the New Jersey statute was a desire only to protect news sources in criminal proceedings such as grand jury investigations. As additional support for such conclusion, the court again noted the New Jersey rule of strict statutory construction and the broad construction accorded the New Jersey rules of pretrial discovery. Id. at 276, 197 A.2d at 419, 420.

Noting finally that a libel action presented considerations "entirely different," the court found the rationale of Brogan controlling, denied the motion to strike plaintiffs' interrogatories, and held that by pleading the defenses of good faith, fair comment, truth and lack of malice, a newspaper thereby waives the privilege of nondisclosure of sources accorded by the statute. Id. at 280, 197 A.2d at 421, 422.

It is interesting to note that the version of the statute with which the Superior Court dealt in Beecroft provided that the privilege was considered waived in only two circumstances: When the newsman contracted with anyone not to claim it, and in the event of the voluntary disclosure of, or agreement to disclose, any part of the privileged matter. One may infer from the opinion, then, that the court either did not consider the statutory privilege applicable to discovery proceedings in libel actions, or in the alternative, even if the privilege does

apply, a judicially constructed waiver made the privilege unavailable:

"Thus, the voluntary interjection in the present case of the defenses of fair comment, good faith, truth, and lack of malice, while conceivably not within the scope of a waiver as defined by [the statute], can nevertheless be viewed as an act constituting an effective waiver as such." Id. at 279, 197 A.2d at 421.

Plaintiffs at bar would have us adopt a similar view for the identical reason. We again respond that the rule of statutory construction pertaining in New Jersey is not the rule in Pennsylvania. Not only are we required to interpret and construe statutes liberally, and in a manner that effectuates both the object of the statute and the intention of the legislature, rather than strictly (1 Pa. C.S.A. §§1921(a)-1928(c)), but we must presume that the General Assembly intends to favor the public interest as against any private interest: 1 Pa. C.S.A. §1922(5). The public interest to be served by permitting the free and unfettered news-gathering function of the press, as contrasted with the private interest in obtaining redress for defamation is fully discussed in Taylor and need not be repeated here. However, speaking in the context of a grand jury proceeding, the Supreme Court of Pennsylvania opined in singular language:

"The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature *which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare* [footnote omitted] than the disclosure of the alleged crime or the alleged criminal." Id. at 42, 193 A.2d at 185-86. (Emphasis in original).

And unlike the New Jersey statute, the act in force in Pennsylvania contains no provision regarding waiver of the privilege. In the face of the quotation from Taylor, we cannot,

as noted earlier, create one for libel plaintiffs and engraft it upon the act.

Of similar significance, the court in Taylor, it will be recalled, defined the scope of a waiver and limited it to that portion of the statement of an informant actually published or publicly disclosed. Plaintiffs would have us force disclosure of confidential sources and the unpublished statements of informants by finding a waiver as the result of defendants having pleaded good faith and reliability of source.

A similar argument was advanced in In re Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972). Appealing an order holding him in contempt for refusing to reveal the contents of a statement made to him by a source already disclosed, a news reporter argued that the word "source" as used in the New Jersey statute protected not only the identity of the source of information, but also protected that part of the informant's statement not published.

The Appellate Division of the Superior Court of New Jersey disagreed, finding a waiver by the reporter as the result of publishing the identity of the source and a part of the information imparted by the source. It is instructive to note that New Jersey Evidence Rule 37, relating to waiver and incorporated in the New Jersey privilege statute, provides exactly that:

"A person waives his right or privilege to refuse to disclose ... a specified matter if he ... without coercion and with knowledge of his right or privilege, made disclosure of *any part* of the privileged matter ..." N.J.S.A. 2A: 84 A-29. (Emphasis supplied).

Pennsylvania, of course, has no such statute and Taylor holds precisely the contrary.

We finally observe that Taylor was decided on July 15, 1963, and the act itself last amended by the Pennsylvania legislature on July 31, 1968, more than five years following Taylor. The amendment re-enacted the act as originally adopted, adding protection for persons employed by the electronic media and wire services. Although presumably aware of the

decision, the legislature again used the words "sources of any information," and no provision regarding waiver was added by the amendment. Section 3 of the Statutory Construction Act, 1 Pa. C.S.A. §1922(4), provides that when a court of last resort has construed the language used in a statute, there is a presumption that the legislative intends the same construction to be placed upon such language as used in subsequent statutes on the same subject. Thus, re-enactment of the identical language by the legislature following the decision in Taylor lends additional weight to the interpretation there placed upon the act by our Supreme Court.

In short, we must also interpret the act broadly and liberally, and in the public interest, and in so doing, do not find that defendants have waived the privilege of nondisclosure by defending the instant action upon the grounds asserted in their answer, or by identifying some of their informants.

Perhaps recognizing the difficulty inherent in the argument that the New Jersey decisions are dispositive of the issue before us, plaintiffs turn to the Federal jurisdiction and cite for our consideration two cases from the United States Courts of Appeal.

In the first of these, Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974), pet. dismissed, 417 U.S. 938, 94 S. Ct. 2654, 41 L.Ed. 2d 661 (1974), plaintiff, general counsel for the United Mine Workers of America, brought an action against Jack Anderson and his associate Britt Hume, based upon an allegedly libelous statement published in Anderson's Column, "Washington Merry Go-Round." At pre-trial depositions, defendant Hume refused to reveal the names of certain eyewitnesses to an allegedly illegal act committed by plaintiff except to say that such persons were employes of the United Mine Workers of America. Plaintiff moved to compel defendants to reveal the names under Fed. R. Civ. P. 37(a), and the District Court ordered defendants to do so.

Affirming the order to the District Court, the Court of Appeals relied upon Garland v. Torre, infra, and held that the question of compelling the disclosure of the source must be determined on a case-by-case basis, a view expressed by Jus-

tice Powell in his concurring opinion in Branzburg v. Hayes, supra:

"The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." [Footnote omitted] Id. at 710, 92 S. Ct. at 2671.

The Court of Appeals then found that the information sought by plaintiff went to the "heart" of plaintiff's libel action and, striking the balance, ordered disclosure.

The authority of Carey is subject to a three-fold limitation, however, in the context of the case at bar, and by the very opinion of the court that announced it. Firstly, defendant reporters in Carey argued as the only basis for nondisclosure that the First Amendment accorded newspapermen an absolute privilege. Subsequent to the argument but prior to the date of the opinion in Carey, the Supreme Court of the United States announced its decision in Branzburg, supra, holding that the First Amendment accorded newsmen no such absolute privilege.

Secondly, the Court of Appeals noted the limited record upon which it was called upon to act:

"What we have decided—and all that we have decided—is that the District Court cannot, on the limited record before us, be said to have abused the discretion vested in it to grant or deny a motion to compel discovery under Rule 37." Cary v. Hume, 492 F.2d 639.

The court left open the question of how it might have decided the case had the record revealed little or no likelihood of plaintiff's recovery, even with the benefit of the discovery he sought. Cf. Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), cert. denied 409 U.S. 1125, 93 S. Ct. 939, 35 L.Ed. 2d 257 (1973), and Ceritto v. Time, Inc., 302 F. Supp. 1071 (U.S.D.C. N.D. Calif. 1969), aff'd per curiam, 449 F.2d 306 (9th Cir. 1971).

Finally, and of particular significance, unlike Pennsylvania, there is no Federal statute conferring a testimonial privilege upon newsmen. Carey arose in the District Court for the District of Columbia, and the D.C. Code, there controlling, contains no such provision. See Carey, supra, at 636, n. 8. We are at bar dealing with a statute of Pennsylvania and the construction of that statute by the Supreme Court of Pennsylvania, unless and until it is declared to be unconstitutional, is again binding authority upon us. Carey in no way suggests a contrary result and the case must, therefore, be considered inapposite.

Lastly, plaintiff's rely upon Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910, 79 S. Ct. 237, 3 L.Ed. 2d 231 (1958), as authority for their position.

Judy Garland, plaintiff, sued the Columbia Broadcasting System and Herald-Tribune Columnist Marie Torre for libel as the result of allegedly defamatory statements made by an unidentified CBS executive and later published in the New York Herald Tribune under Torre's by-line.

Pretrial, plaintiff deposed Columnist Torre and in the course of the examination, Torre refused to identify her CBS source. Proceedings were commenced in the District Court to compel Torre to identify the source. The District Court directed Torre to disclose the name, and upon her refusal to do so, adjudged her in contempt.

On appeal to the Court of Appeals for the Second Circuit, Torre asserted three alternative arguments: (1) The First Amendment protects absolutely against disclosure of any source; (2) if not, then at least the First Amendement provides a qualified privilege and protects the identity of a confidential source; and (3) regardless of the first two arguments, the District Court abused the discretion granted it under Fed. R. Civ. P. 30 to make protective orders in that Torre's position as a journalist could be injured from her compulsion to testify, plaintiff might be able to obtain the information elsewhere, and plaintiff's claim was, in any event, of doubtful merit with the result that the information sought would probably prove of no actual use to plaintiff.

Although pre-Branzburg, the Court of Appeals found no absolute privilege against disclosure in the First Amendment[10], found no qualified privilege in the absence of a statute creating one, and quickly disposed of Torre's last argument by finding no abuse of discretion on the part of the District Court in that the information sought by Garland was relevant and material. Torre's conviction of criminal contempt was affirmed.

In dismissing defendant's constitutional claim of privilege, the court noted that the question propounded of Torre "went to the heart of the plaintiff's claim." Id. at 550.

Seizing upon this language, plaintiffs' here tell us that the reporters' notes at bar contain information which goes to the heart of their claim, and as in Torre, this court should, regardless of the language of the Pennsylvania statute and Taylor, direct the disclosure of such notes.

It is first observed that at argument, plaintiffs' counsel, responding to a question by the court, asserted that without any of the material sought by them to be produced, plaintiffs' case was of sufficient strength to at least go to the jury. It will also be recalled that since the date of argument, defendants have provided plaintiffs with additional material. We must, therefore, question plaintiffs' contention that the reporters' notes go to the heart of plaintiffs' claim. Equally significant, we find Garland wholly inapposite to the case before us. Again, no statute of either New York or the Federal jurisdiction conferred a testimonial privilege upon reporters in Garland. Id. at 550. We are here dealing with an act of the legislature of Pennsylvania, but the Garland court was not. We are further confronted by a broad and liberal interpretation of our statute by a State court of last resort. The Garland court labored under no such burden, and was free to cast its holding in the mold it chose: the balance to be struck between

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10. The court also concluded that freedom of the press, if in fact it *is* embodied in the First Amendment, "must give place under the Constitution to a paramount public interest in the fair administration of justice." Id. at 549.

the First Amendment freedom of the press and the societal interest in obtaining the testimony of all witnesses.[11] Thus, without regard to whether the notes at bar "go to the heart" of plaintiffs' claim, we are not at liberty to strike the balance in favor of plaintiffs, as it has already been struck for us by the court in Taylor.

Accordingly, as we observed in the case of the New Jersey decisions advanced by plaintiffs, we conclude that the Federal authorities cited by them are not controlling and offer no relief to plaintiffs. Taylor is binding upon us, however, and we find that although it arose in the context of a grand jury proceeding, its holding is sufficiently broad to encompass a civil libel action, and, as so stated, Taylor does not permit us to order production of the notes and memoranda made by reporters Ecenbarger and Lambert in the course of interviews with informants, whether disclosed or not and without regard to whether such notes or memoranda will reveal or lead to the revelation of the identity of confidential informants.

(2) Production of Other Articles

Plaintiffs also seek production of all articles published in The Philadelphia Inquirer and written by reporters Ecenbarger and Lambert, either individually or jointly with others. Defendants first refuse production on the ground that the articles are irrelevant to plaintiffs' cause, as such request must of necessity seek production of "many articles published by defendant [sic] William Ecenbarger and William Lambert on subjects that have nothing to do with the suit at hand."

Pa. R.C.P. 4009 under which plaintiffs here proceed, permits the inspection of documents subject, inter alia, to the limitations imposed by Rule 4007(a). The latter rule limits

11. "If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. 'The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.' [citation omitted]." Id. at 549.

discovery to matters "relevant to the subject matter involved in the action."

We observe at the outset that plaintiffs endeavor to place the burden of showing irrelevancy on defendants, citing Kaylor v. Baran, 5 D.&C. 2d 567 (1956), standing as it does for the proposition that when a party objects to discovery on the ground of relevancy, the burden is upon the objector to establish irrelevancy. Defendants, to the contrary, assert that the burden of establishing relevancy is upon plaintiffs and requires in the first instance a showing of relevancy. Cf. Lichtman v. Lipoff, 10 D.&C. 2d 725 (1957).

We think the better view, in a case where the complaint and answer are already before the court as here, should require the court to determine on the basis of the pleadings whether there is any conceivable basis of relevancy, and, if there is, discovery should be permitted: 4 Goodrich-Amram §4007(a)-19, 118. Such view is in accord with the principle that in discovery proceedings doubts as to relevancy should be resolved in favor of relevancy: Eversole v. Dinulos, 13 Lebanon 4 (1970). We must, therefore, determine whether on this record articles written by defendant reporters are, or could conceivably be, relevant to plaintiffs' cause of action.

As former President Judge Davis said in O'Connor v. Fellman, 39 D.&C. 2d 51 (1966):

"... the test of relevancy in discovery proceedings under Pa. R.C.P. 4007 is not whether the anticipated answer to the proposed question can immediately qualify as admissible evidence, but whether the proposed question may possibly lead to an answer or answers which, alone or together, may be admissible and possess sufficient probative force to affect a material part of the cause of action." Id. at 54.

And see, to the same effect, Rearick v. Griffith, 27 D.&C. 2d 451 (1962), an able opinion by the late Judge Thomas A. Riley of this court.

Plaintiffs assert that other articles written by defendant reporters are relevant to the defense of good faith, as if defendant PNI intends to claim it relied upon the integrity of its reporters, Ecenbarger and Lambert, such defense might be

defeated upon a showing that the reporters had little or no experience or competence in the form of investigative reporting here involved.

We note that defendants' answer to the complaint raises several defenses including constitutional privilege,[12] fair and accurate reports of the activities and conduct of public officials and public figures,[13] fair and accurate reports of judicial, administrative and governmental activities and proceedings,[14] reports of "highly newsworthy matters of substantial public interest and concern,"[15] and reports of matters of public record and thus privileged.[16] Finally, in paragraph 22 of their answer, defendants aver:

"22. The publications complained of were written and published based upon reliable sources, in good faith, without malice, on proper occasion and with proper motives, in the

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12. Paragraph 17 of defendants' answer avers, in its entirety that "[t]he publications complained of are protected speech and privileged under the First and Fourteenth Amendments to the Constitution of the United States and under the laws of the Commonwealth of Pennsylvania." Stripped to the bone, the paragraph appears to aver an absolute privilege. We point out again that there is no absolute privilege, and defamatory publication is not constitutionally protected: Gertz v. Welch, 418 U. S. 323, 341, 346, 41 L. Ed. 2d 789, 806, 809, 94 S. Ct. 2997, 3008, 3010.

13. See New York Times v. Sullivan, 789 infra (public official); Curtis Publishing Company v. Butts, 388 U. S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) (public figure); and Walker v. Associated Press, 388 U. S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) (public figure), the latter two, extensions of the former.

14. See Cox Broadcasting Corp. v. Cohn, 420 U. S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975).

15. This defense appears to be cast in the mold of Rosenbloom v. Metromedia, Inc., 403 U. S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971). The doctrine set forth in the plurality opinion and the extension of New York Times v. Sullivan there proposed have been thoroughly discredited and effectively overruled, and in the words of Justice Powell, have become "unacceptable": Gertz v. Welch, 418 U. S. at 346, 41 L. Ed. 2d at 809, 94 S. Ct. at 3010; and see Time, Inc. v. Firestone, 424 U. S. 448, 454, 47 L. Ed. 2d 154, 163, 96 S. Ct. 958, 965 (1976).

16. See, again, Gertz v. Welch, supra, and its caveat concerning a publisher's "interpretation" of matters of record.

belief that the facts set forth therein were true and without any reason to doubt their truth."

The words "good faith" appear only in the quoted paragraph and are the words to which plaintiffs refer.

At bar, plaintiffs' complaint seeks not only actual or compensatory damages, but punitive or exemplary damages as well. The Supreme Court of the United States has held that without regard to whether a plaintiff in a libel action is a public figure or official, an award of punitive or exemplary damages can be constitutionally supported only upon proof that the libel defendant knew the published article was false, or published the article with a reckless disregard of whether the story set forth in the article was false or not: Gertz v. Welch, 418 U. S. at 349, 41 L. Ed. 2d at 810, 94 S. Ct. at 2997 (1974).[17] Such standard has been equated to actual malice and, hence, the rule that punitive or exemplary damages may only be recovered in a libel action against a newspaper upon a showing that the defamatory article was published with actual malice: New York Times Co. v. Sullivan, 376 U. S. 254, 279, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726 (1964).

It is conceivable that an examination of other articles written by defendant reporters may well indicate that the articles at bar represent a first endeavor. We say, without intending to decide the question, that such fact might have imposed some duty upon PNI not otherwise imposed, and a duty which it failed to perform, and further, that the omission or failure is recklessness of the degree required by New York Times Co. v. Sullivan for the imposition of punitive damages.[18]

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17. Plaintiffs' memorandum of law, p. 8, n. 2 to the contrary notwithstanding.

18. See, for example, Cerrito v. Time, Inc., supra, detailing at length the elaborate procedures designed by Life Magazine to enable it to determine whether it might justifiably rely upon the accuracy of articles written by one of its reporters on the subject of organized crime.

In Cerrito, Life commissioned a veteran reporter, thoroughly accredited and recognized as an expert in the field of organized crime, to prepare a series of articles on the subject of organized crime in the United

We thus conclude that other articles written by reporters Ecenbarger and Lambert are relevant and will substantially aid plaintiffs at trial and should, therefore, be produced for inspection unless some other Rule of Civil Procedure bars production.

Rule 4011(a) prohibits discovery and inspection which is sought in bad faith. Rule 4011(b) prohibits the same when it will cause unreasonable annoyance, embarrassment, expense or oppression to any person or party, and Rule 4011(e) prohibits discovery and inspection which would require the making of an unreasonable investigation by, inter alia, any party or witness. Defendants object to plaintiffs' request to inspect all articles written by Ecenbarger and Lambert on these grounds as well.

Defendants ground their "bad faith" objection under Rule 4011(a) upon three bases: (1) The plaintiffs seek irrelevant material and such request, therefore, "could only have been made in bad faith," (2) plaintiffs' request for production was made with the intent to cause defendants unreasonable annoyance, expense and oppression; and (3) production of the articles would require the defendants to make an unreasonable investigation.

As is at once apparent, each of the grounds asserted by the defendants as constituting bad faith is itself a separate basis under Rule 4011 upon which discovery may be prohibited. No other ground upon which we might find bad faith is

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States. As a part of his contract, the reporter asked that he not be required to reveal his sources of information because of the great potential of harm to such sources. Life agreed but by reason of the request and "aware of the developing law, went beyond the normal editorial review of the article," 302 F. Supp. at 1074. In addition to a careful and in-depth review by the editorial staff, Life hired an independent panel of experts to verify the reporter's statements and to then advise Life whether it was justified in relying on the accuracy of such statements.

We do not intend to suggest that PNI should have so acted instantly. We do say, however, that evidence of the procedures followed or not followed by PNI will certainly be admissible at trial as bearing on the issue of recklessness.

asserted by defendants. Accordingly, we examine each of the three bases individually, and if none have been established, we may not, on this record, find bad faith.

With respect to the first of these grounds asserted, that of relevancy, defendants are quite correct in their assertion that a request for production of irrelevant material may indeed be an exercise of bad faith in the context of the Rule 4011(a): Fidelity & Deposit Co. of Md. v. Yeo, 12 Bucks 448, 76 York 141 (1962); Pottstown Lincoln-Mercury, Inc. v. Montgomery County Auto Sales, Inc., 2 D.&C. 2d 396 (1954). However, we have already determined that the articles are relevant, and a request for relevant material cannot without more be an exercise in bad faith.

As to the second basis, again defendants correctly state that discovery causing unreasonable annoyance, expense or oppression, or discovery designed to harass may be prohibited under Rule 4011(a), as made in bad faith, as well as being specifically prohibited by Rule 4011(b): 5A Anderson, Pa. Civ. Prac., §4011.11. We should thus decide whether production of the articles at bar will cause defendants unreasonable annoyance, expense and oppression. Unfortunately, we cannot, as defendants have failed to provide us with any facts whatever from which we might find or infer unreasonable annoyance, expense or oppression.

When the moving party has shown a prima facie right to discovery, the party raising an objection under Rule 4011 has the burden of proving that the objection is well founded: White v. Wasco, 57 Luz. 261 (1967); Lichtman v. Lipoff, supra; Lippencott v. Graham, 3 Bucks 16 (1953); Minichino v. Borough of Quakertown, 88 D.&C. 83 (1954); 5A Anderson, Pa. Civ. Prac. §4011.4. Plaintiffs have shown a prima facie right to discovery by seeking relevant material, and defendants have, therefore, clearly failed to carry the burden imposed upon them, as they have not advanced a single reason to support their objection. Excepting the use of the words "multitudes of articles," defendants have merely repeated the language of the rule in framing their objection. Simply because "multitudes" of articles may be involved does not, in and

of itself, permit us to determine that production imposes an unreasonable burden. All articles may well be in a single file, for example, easily and quickly available to the defendants.

We may not speculate as to the reasons why production might cause such results to follow, and in the absence of any facts at all upon which we might make a judgment, the objection cannot prevail.

Lastly, defendants object on the basis that production of the articles will require them to embark upon an unreasonable investigation, and, therefore, the request is again an exercise of bad faith on the part of plaintiffs, in violation of Rule 4011(a) as well as 4011(e).

Again, we should decide whether production would require an unreasonable investigation, but as before, defendants have failed to furnish us with a single fact upon which we might base such decision. Merely showing that production will occasion great investigative effort and expense, without some evidence that the burden so imposed would be unreasonable, is not sufficient to prevail under Rule 4011(e): 5A Anderson, supra, §4011.115. On this record, we are unable to determine whether any investigation is required, let alone an unreasonable investigation. Our discussion of the burden of proof upon the objecting party in connection with Rule 4011(b) is germane to an interpretation of Rule 4011(e). Defendants, again, by failing to provide us with any facts have thus failed to sustain the burden imposed upon them and the objection must be overruled.

Thus, finding the articles sought by plaintiffs to be relevant, and at the same time finding no substance in the objections to discovery interposed by the defendants, we will order the defendants to produce the articles.[19]

(3) Performance Records

By paragraph 6 of their motion for production, plaintiffs request all documents in the possession or control of the de-

19. In the event defendants determine in the course of accumulating the articles that some require an unreasonable investigation or expense, they may at that time present such evidence to the court and seek a protective order.

fendants "concerning the performance of either individual defendant in the course of his employment with Philadelphia Newspapers, Inc." Defendants resist production on the grounds that (1) such records are, again, irrelevant, (2) the request is made in bad faith, and (3) production is burdensome and oppressive, and will cause defendants to make an unreasonable and annoying investigation. In its memorandum of law at pages 15-16, defendants additionally assert that the request for "confidential and highly personal" records is designed to harass and annoy the defendants,[20] and that information contained in such records "could not possibly be utilized by plaintiffs' in their endeavor to prove the libelous character of the articles in question.

It was observed that during the course of oral argument, counsel for the parties continued to refer to the documents sought by the plaintiffs as "employment records." As we understand that phrase, it is important to say again that plaintiffs' request is not nearly so broad. Plaintiffs seek only records of the performance of the individual defendant reporters while employed by PNI.[21]

For the reasons set forth in our discussion on production of other published articles, we find performance records of the individual defendants relevant. Nor can we say that the request for production of such records is subject to limitations of Rule 4011 as advanced by defendants, again for the reasons that defendants have failed to place before us any facts to unable us to determine whether production is burdensome or oppressive, or will cause an unreasonable investigation.

Again we note that PNI may, at trial, defend its position by asserting the reliability of its reporters. Internal records maintained by PNI may serve to cast doubt upon the wisdom or propriety of such reliance. Clearly, the documents are rele-

20. One must assume that *all* discovery is to some degree annoying.

21. While plaintiffs might have phrased the request in more explicit language, it may well be that PNI management maintains records of performance ratings of news reporters. At least PNI admits to the possession of such material.

vant, and most assuredly are they so in the context of pretrial discovery.

Defendants also characterize performance records of defendant reporters as "confidential and highly personal." The records may well be confidential and personal, but so long as they are not privileged they are subject to discovery if they are relevant and will substantially aid in the preparation or trial of the case. Rule 4009 permits the inspection of all tangible things, subject only to the limitations imposed by Rules 4007(a) and 4011. The latter limiting rules do not prohibit discovery of confidential or highly personal documents,[22] unless, as noted, such documents are privileged. Defendants cite to us no privilege and we are aware of none. Accordingly, the performance records of the individual defendants, it there are such, should be produced and we will so order.

ORDER

And now, to wit, March 16, 1977, defendants are hereby ordered to produce for inspection (1) all articles prepared by William Ecenbarger and William Lambert, individually, jointly or jointly with others and published in the Philadelphia Inquirer, and (2) all records pertaining to the performance of the said William Ecenbarger and William Lambert as news reporters while in the employ of Philadelphia Newspapers, Inc.; plaintiffs' motion for production of notes and memoranda made by the said William Ecenbarger and William Lambert of interviews of informants conducted in the course of preparing the articles which form the basis of the within litigation is hereby denied and dismissed; and except as herein otherwise provided, plaintiffs' motion for production is hereby denied and dismissed.

22. Interestingly, defendants do not assert that production of performance records would cause them "unreasonable embarrassment," which *is* a basis for denying discovery and inspection: Rule 4011(b).

ORDER

COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

[Caption Omitted in Printing]

AND NOW, TO WIT, February 6th, 1981, upon consideration of the Plaintiffs' Motion for Partial Summary Judgment with respect to liability or in the alternative, to deem certain facts to be established for purposes of trial, and the Defendants' Motion for Summary Judgment, together with the pleadings, depositions, admissions, supporting affidavits, memoranda of law, and oral arguments, the Court orders as follows:

1. The Plaintiffs' Motion for Partial Summary Judgment with respect to liability is hereby denied;

2. The Defendants' Motion for Summary Judgment is hereby denied;

3. The Plaintiffs' Motion to deem certain facts to be established for purposes of trial, filed pursuant to Pa. R.C.P. No. 1035(c) is denied except as follows:

(a) The five newspaper articles which appeared in the corporate Defendant's newspaper, The Philadelphia Inquirer, on May 5, 1975, September 15, 1975, January 16, 1976, February 5, 1976, and May 2, 1976, and all statements contained therein, were "published" by the said corporate Defendant to third persons, and shall be deemed so for purposes of trial;[1]

(b) The five said newspaper articles, and the

1. The Defendants do not seriously dispute the assertion that the articles were published by the corporate Defendant, and that the articles so published were prepared for publication by one or the other or both individual Defendants. We also judicially notice that The Philadelphia Inquirer is a newspaper of general circulation in the Delaware Valley. 45 P.S. §3(4); *Hepps v. Philadelphia Newpapers, Inc.* ____ Ches. Co. Rep. ____, 3 D. & C. 3d 693, 694 (1977).

statements contained therein, of which the Plaintiffs complain, are capable of defamatory meaning with respect to the Plaintiffs;[2]

(c) The Plaintiffs, for the purposes of the within action, are private and not public figures;[3]

(d) As private figures, the Plaintiffs must prove, by a preponderance of the evidence, that the Defendants were negligent[4] in publishing the allegedly false statements of which the Plaintiffs complain, in addition to proving the remaining elements of their action.[5]

By the Court

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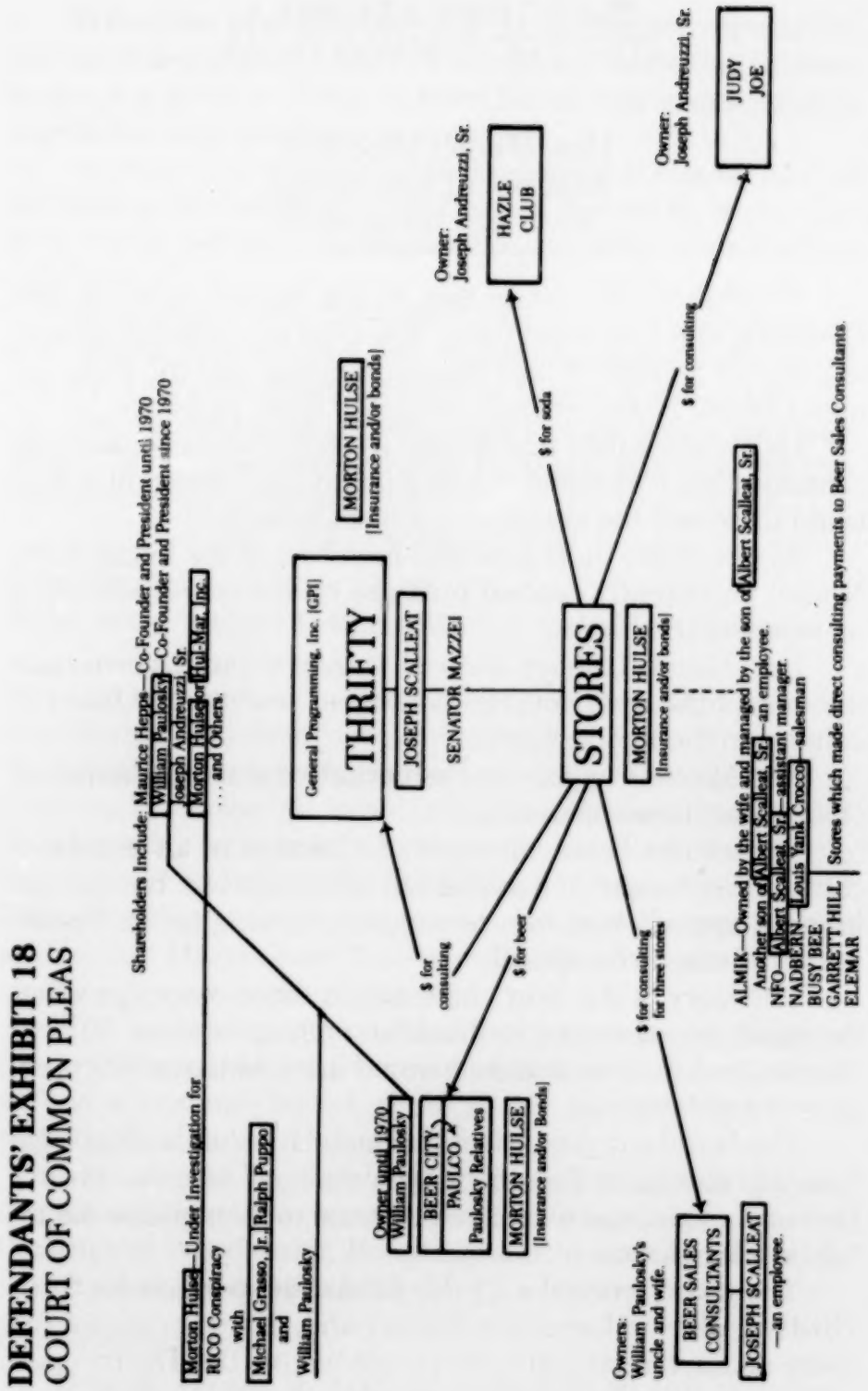
2. As to the individual Plaintiff, see *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 442, 273 A. 2d 899, 904 (1971), and as to the corporate Plaintiffs, see *Cosgrove Studio and Camera Shop, Inc. v. Pane*, 408 Pa. 314, 319, 182 A. 2d 751, 753 (1962), citing *Restatement*, Torts §56.

3. The question of whether a plaintiff is a public or private figure is one of law, to be addressed by the Court. *Wolston v. Reader's Digest Ass'n*, 578 F. 2d 427, 429 (D.C. Cir. 1978) *rev'd on other g'nds*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979). *See also, Rancho La Costa v. Superior Court*, 6 Med. L. Rptr. 1351 (Cal. Ct. App. 1980).

4. Our ruling, of course, is applicable only to the Plaintiffs' claim for compensatory damages. The claim for punitive damages is clearly controlled by the standard articulated in *Gertz v. Welch*, 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 810 (1974).

5. *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 410-12 (E.D. Pa. 1978).



PLAINTIFFS' EXHIBIT 1
COURT OF COMMON PLEAS

MAY 5, 1975

How Mazzei Used Pull, Kept Beer Chain Intact

By WILLIAM ECENBARGER
Inquirer Harrisburg Bureau

HARRISBURG—State Sen. Frank Mazzei, a Pittsburgh Democrat and convicted felon, has used his political muscle to preserve a chain of beer distributorships that the State Liquor Control Board ordered disbanded three years ago.

He accomplished this despite the fact that the liquor code contains legal restrictions against chain-type ownerships that could undersell the single-owner distributors.

As one of the most powerful members of the Legislature, Mazzei persistently applied pressure on the governor's office on behalf of the chain.

Gov. Milton J. Shapp allowed Mazzei to put his own man into one of the state government's most sensitive positions—counsel to the liquor board.

And Mazzei's appointee has permitted the once-banished chain to continue operating.

Mazzei has been convicted of extortion in an unrelated case and sentenced to five years in federal prison, but his colleagues have allowed him to continue serving in the Senate while his case is on appeal.

The story of the beer chain began three years ago when the liquor board moved to break up a chain of some 30 beer distributorships that it feared would drive independent operators out of business.

The board acted on the recommendation of its chief legal counsel, Alexander J. Jaffurs, who charged that the Thrifty Beverage chain was illegal and a threat to monopolize the retail beer business.

The board ordered a 21-day license suspension for three Thrifty outlets in Lancaster County and, in a test case for the entire chain, directed that the people behind the Thrifty operation sever their financial ties with the distributorships.

Before the penalities were imposed, Thrifty appealed to the Lancaster County Court. At this point, Mazzei began pressuring top aides to Shapp to have Jaffurs (an administration appointee) tone down his prosecution.

Mazzei had considerable leverage. He was one of the most powerful men in the General Assembly, which was then being asked to approve major administration-backed legislation.

In October 1973, Lancaster County Court upheld the liquor board and ordered the penalties carried out against Thrifty. This ruling was appealed to Commonwealth Court.

But three months earlier something important had happened: Jaffurs was fired suddenly by Shapp, who charged that Jaffurs was "incompetent." Jaf-

(See MAZZEI on 2-A)

How Mazzei Kept Beer Chain
State Senator Used Political Muscle to Aid His Business

furs said he was fired because he refused to yield to pressure from Mazzei and other powerful legislators.

About a year ago Shapp replaced Jaffurs with an obscure 71-year-old Pittsburgh Republican named Harry Bowytz. No one was quite sure how Bowytz got the job, but last week the mystery was cleared up. Richard Doran, Shapp's top aide, said he named Bowytz on the recommendation of Mazzei. Bowytz said he and Mazzei have "known each other for years." Mazzei could not be reached for comment.

The leadership behind the Thrifty operation is Maurice (Sonny) Hepps, 45, of Westtown, Chester County. Bowytz' wife is a longtime friend of the Hepps family—"Her father took my tonsils out," Hepps said last week.

Last August Thrifty abruptly dropped its appeal to Commonwealth Court, but instead of carrying out the penalties in the original board order, Bowytz sat down with Thrifty attorneys to work out a "stipulation."

Penalties Reduced

Bowytz agreed to a sharp reduction in the penalties against Thrifty. Instead of the original 21-day suspensions

(suspensions are severe penalties in the competitive "beer" business) he fined the three distributors $1,000 each.

More importantly, Bowytz dissolved all existing management agreements between the distributors and Hepps firm, General Programming Inc.

But then Bowytz approved a new set of management agreements that keep the Thrifty chain intact.

Bowytz recommended that the outlets even be allowed to continue to use the "Thrifty" name, but he was overruled on this by the state attorney general. Otherwise, Bowytz' recommendations were accepted by the board last Jan. 15.

Most of the Thrifty distributorships are now putting up new signs—"Brewer's Outlet."

The revised consulting agreements between General Programming and the various outlets are quite similar to the ones that had been declared illegal by the Lancaster County Court, but Bowytz has said that they meet all the requirements of the Liquor Code.

The agreements are important because until Thrifty came along, distributorships in Pennsylvania traditionally were one-owner operations. The liquor code says, in brief, that no one person can have a financial interest in more than one distributorship.

Basis of Ruling

It was on this basis that the original Thrifty arrangement was outlawed by Lancaster County Court. The new management agreements approved by Bowytz still give Hepps a percentage of the gross profits of each store, and the distributors will lease their stores from Hepps.

Although he voted to approve the new agreements, Board Member Daniel Pennick concedes that they contain nothing to prevent General Programming from receiving "exorbitant" rentals from the distributors.

Hepps says his operation is the largest retail beer retailing network in the nation. His outlets undersell independents by as much as $1 a case. Among the licensed Thrifty distributors are Hepps' friends and members of his family.

There is no visible financial link between Mazzei and the Thrifty operation, but there is a clear pattern of interference

in state government by Mazzei on behalf of Hepps and Thrifty.

The most serious occurred during the trial in Lancaster County Court. Writing on his official Senate stationery, Mazzei requested and received from the board copies of certain board records that he claimed he needed for legislative purposes.

Revised Agreements

But several days later these same records turned up in the hands of Thrifty attorneys, and were used against the liquor board in the court case.

George Lindsay, chief Thrifty lawyer, turned up on Mazzei's payroll in 1973 as an $8,000-a-year consultant to the Transportation Committee.

Mazzei has several underworld associations, one of which is Joseph Scalleat of Hazleton, who is described by the State Crime Commission as a Cosa Nostra leader. Bowytz says he also is an "acquaintance" of Scalleat. Scalleat's wife is a licensed Thrifty distributor in Bucks County.

Mazzei's activities involving the liquor board are under investigation by the office of U.S. Attorney Richard Thornburgh of Pittsburgh, who prosecuted the senator on the extortion charge.

MAY 7, 1975

Clearing the Record

In Monday's editions, The Inquirer incorrectly stated that the wife of Joseph Scalleat was a licensed beer distributor in Bucks County. It is the sister-in-law of Mr. Scalleat, Rose Scalleat, who is the distributor.

It is the intention of The Inquirer that its news reports be fair and accurate in every respect. If you have a question or complaint regarding news coverage write the Public Service Editor, The Inquirer, 400 N. Broad St., Philadelphia, Pa. 19101, or call 854-2598 between the hours of 2 and 5 P.M. Sunday through Thursday. Each inquiry will be investigated and, when appropriate, a correction or clarification will be published.

PLAINTIFFS' EXHIBIT 2
COURT OF COMMON PLEAS

SEPTEMBER 15, 1975

While Shapp's Off Campaigning, Investigations Heat Up at Home

By WILLIAM ECENBARGER
Inquirer Harriburg Bureau

HARRISBURG—As he crosses the nation in quest of the presidency, Gov. Milton J. Shapp's political future is imperiled at home by a series of investigations into his administration that has grown by the week.

At this moment, there are at least 21 investigations by federal, state and local authorities delving into actions of the governor himself, his top political associates, cabinet members and major gubernatorial appointees.

So far, Shapp's 1970 campaign manager has been convicted by two different federal juries of extorting more than $100,000, the state treasurer of the Democratic Party has been convicted of forcing state employees to make political contributions, and four lesser state officials have been indicted on bribery, extortion and other charges.

Under investigation are Shapp's 1970 campaign finances, three top party officials, the Property and Supplies Department, the Transportation Department, the Revenue Department, the Liquor Control Board, the Racing Commission and the State Police.

It was disclosed last week that a federal grand jury in Pittsburgh planned to investigate widespread irregularities in the State Bureau of Professional and Occupational Affairs, which licenses doctors, pharmacists, real estate brokers, barbers and other groups.

In addition, The Inquirer has learned of these new developments in the major investigations:

• Julian Rothman, Shapp's brother-in-law and onetime appointment aide, has been subpoenaed to appear before a federal grand jury in Philadelphia this week. He will be asked about a mysterious $10,000 cash contribution to the governor's 1970 campaign—apparently from a dairy firm interested

in relaxing state price controls on milk. Rothman left the governor's office in 1973 and moved to Florida.

• Frank Hilton, Shapp's 1970 campaign manager and former Secretary of Property and Supplies, who has been convicted of extortion, is scheduled to appear before a federal grand jury in Harrisburg on Sept. 24. Reliable sources said that Hilton had been granted immunity from prosecution to testify about what he did with kickbacks he received on state insurance policies.

• Federal authorities are investigating the Thrifty Beverage chain of beer distributorships, which has won a series of competitive advantages through rulings by the State Liquor Control Board. The investigators have found connections between Thrifty and underworld figures. A major Thrifty backer is former State Sen. Frank Mazzei, a Pittsburgh Democrat, who was convicted of ex-

(See SHAPP on 4-A)

tortion and expelled from the Senate by his colleagues.

• Federal authorities are looking at the state's automobile purchasing practices to determine if official bid specifications have been rigged in favor of one manufacturer.

Shapp himself is scheduled to appear before a federal grand jury in Pittsburgh on Oct. 9 to explain $20,000 in cash contributions after his election in 1970 by Michael Baker Jr., head of one of the world's largest engineering firms. The money was not reported by the governor as a campaign contribution.

The Inquirer reported last month that Pennsylvania's flood recovery plan was revised in 1972 so that a $75,000, no-bid contract could be steered to Baker. His firm has received more than $5 million in state contracts since Shapp became governor.

The Inquirer also has reported that Shapp was informed in September 1974, that an investigation by the Governor's Office had turned up evidence of corruption and mismanagement in the state's 21 occupational licensing boards. No steps were taken to correct the deficiencies at that time.

Licensing Commissioner Louis P. Vitti has resigned. But last week he was subpoenaed to appear before the federal grand jury in Pittsburgh.

The U.S. Securities and Exchange Commission has started a preliminary inquiry into Shapp's sale of his interest in a Willamsport cable television business in 1971 at a profit of nearly $2 million. Before the sale, the Willamsport City Council approved a new 23-year franchise for the operation, and shortly thereafter two of the councilmen got jobs with the Shapp administration. Shapp has denied any connection with the granting of the franchise.

These top Shapp associates are under investigation:

• Dennis (Harvey) Thiemann, Democratic state chairman, has appeared before the Pittsburgh grand jury to answer questions on a pattern of political contributions and state contracts through the General State Authority, the state's capital construction arm.

• Egidio Cerilli, named by Shapp as chairman of the Pennsylvania Turnpike Commission, is under federal investigation for political kickbacks while he was the State Transportation Department's maintenance chief in Westmoreland County.

• Eugene L. Coons, Allegheny County (Pittsburgh) Democratic chairman and a prominent Shapp ally, is under federal investigation for allegedly accepting payments from underworld figures.

• Joseph L. Lecce, a former Shapp business partner, resigned as chairman of the State Racing Commission after questions were raised about track ownership. The State Justice Department is investigating charges of law enforcement, favoritism and conflicts of interest at race tracks.

• George J. Mowod, state revenue secretary, has appeared before a federal grand jury investigating his handling of sales tax collections.

• William J. Casper, Democratic state treasurer and an official in the Revenue Department, has been convicted of macing—forcing political contributions from state employees.

Also, federal and state investigators are looking into a widespread extortion scheme involving the Liquor Control

Board's top enforcement officers and at least 20 liquor agents. The State Justice Department and the FBI have found a pattern of kickbacks from tavern owners to liquor agents in exchange for quashing violation reports.

And last week a Dauphin County grand jury agreed to investigate an alleged State Police cover-up of traffic accidents involving state troopers who had been drinking. District Attorney Leroy Zimmerman claims that he has evidence in 11 cases.

Five Philadelphians have been indicted on federal charges of conspiracy, extortion and income tax evasion in connection with a smuggling operation to avoid payment of the state cigaret tax. The defendants include Vito N. Pisciotta, a Common Pleas Court judge; John R. Sills, former Democratic City Committee patronage chief; and three state cigaret agents.

Bernard Rasper, former State Revenue Department sales tax supervisor for the Philadelphia area, and one of his agents were convicted last month of extortion, conspiracy and bribery in the shakedown of an appliance dealer.

The State Justice Department is investigating the Military Affairs Department's hiring of Anthony Altavilla, a former Hilton aide who participated in Hilton's untrue explanation of his personal finances. After being dropped from the state payroll, Altavilla was quietly rehired to "inspect armories."

Federal authorities in Scranton are investigating a series of state leases negotiated under Hilton in which friends and political associates of Shapp rented office space to the state under favorable terms.

There are a number of investigations involving county maintenance offices of the Transportation Department.

The Philadelphia special prosecutor, Walter M. Phillips Jr., has indicted 15 employes of the Philadelphia maintenance office, including Supervisor Joseph Brocco. Eleven employes of the Mercer County highway district were indicted by a county grand jury last week, including the Democratic county chairman. On Thursday William Heller, Monroe Count highway chief, pleaded guilty to perjury in federal court in connection with extortion on snow-plowing contracts.

PLAINTIFFS' EXHIBIT 3
COURT OF COMMON PLEAS

JANUARY 16, 1976

Beer Chain Probed for Mafia Tie

By WILLIAM LAMBERT and WILLIAM ECENBARGER
Inquirer Staff Writers

HARRISBURG—A federal grand jury has started an investigation of alleged Mafia ties to a chain of Pennsylvania beer distributorships that has won consistently favorable rulings from the Pennsylvania Liquor Control Board.

The convening of the secret grand jury here last week is the result of a one-year investigation by the Philadelphia Strike Force on Organized Crime into the "Thrifty Beverage" group of about 30 beer outlets in eastern and central Pennsylvania.

Federal officials refused to comment on the grand jury and would not confirm the existence of the investigation but reliable sources said the grand jury was looking into:

• The alleged relationship between the Thrifty chain and known Mafia figures in northeastern Pennsylvania.

• Whether the chain received special treatment from the Shapp administration and the Liquor Control Board.

• A possible connection between Thrifty and a number of small insurance companies controlled by organized crime.

The specific areas of possible illegality include fraudulent use of the mail on applications for state distributorship licenses and violations of

(See THRIFTY on 5-A)

state and federal banking laws in Thrifty's complex financial arrangements.

The initial witnesses before the grand jury were Strike Force personnel and other federal law enforcement officers who took part in the investigation.

The Inquirer has learned that a central figure in the inquiry was a midstate insurance broker who represented the

link between the beer and insurance industries and who has been subpoenaed to testify.

A former Liquor Control Board official has charged that Thrifty is involved in a conspiracy with state officials to create a monopoly that will wipe out small, independent beer distributors.

The Thrifty chain has been involved in a long legal dispute over a section of the state liquor code that forbids any person to have a financial interest in more than one beer distributorship.

The Thrifty chain operates this way: At the core is a consulting firm that issues franchises to individual beer distributors. The consulting firm provides the distributors with advice and allows them to use the Thrifty name.

In return, the distributors pay the consulting firm either a fixed fee or percentage of gross sales.

Many of the individiual licennsed Thrifty distributorships are run by associates and relatives of officers in the consulting firm.

A Bucks County outlet is controlled by Albert Scalleat, a nephew of Joseph Scalleat of Hazelton, Pa. Joseph Scalleat has been identified as a Mafia leader by the State Crime Commission.

One of the principal breweries supplying the Thrifty chain was Furhmann & Schmidt (F&S) until it filed a voluntary bankruptcy petition last year. A major F&S owner is Joseph Lecce of Williamsport, a former business partner of Gov. Milton J. Shapp in the cable television industry and, until last year, Shapp's appointee as chairman of the state Racing Commission.

Four years ago the Liquor Control Board, through chief counsel Alexander Jaffurs, moved to break up the Thrifty chain on the ground that it violated the Liquor Code prohibition of multiple ownership.

After long proceedings, Jaffurs won his point in October 1973 when Lancaster County Court ordered the board to impose 21-day suspensions on the three Thrifty outlets in the test case and disband the chain.

But before the court ruling, Jaffurs was fired by Shapp, who called the chief counsel "incompetent."

Jaffurs, however, contended that he had been dismissed because he was "getting too close to Thrifty." Jaffurs said he refused to drop the case despite pressure from several state political figures—including former State Sen. Frank Mazzei, a Pittsburgh Democrat now serving a five-year federal prison term for extortion.

Jaffurs said that Mazzei had used the influence of his legislative office to obtain from the board official documents that were later used by attorneys for Thrifty in the court case. In addition, Geroge Lindsay, Pottsville attorney and a key figure in the Thrifty operation, was hired by Mazzei as a consultant to the Senate Transportation Committee.

After Jaffurs was fired by Shapp, the board failed to act on the Lancaster County Court order to break up the Thrifty chain and suspend the distributorships for 21 days each.

Shapp announced in April 1974 that he had hired Harry Bowytz of Pittsburgh to succeed Jaffurs as the chief counsel to the board.

The Inquirer learned that Bowytz was recommended to Shapp by Mazzei. Hired to assist Bowytz in board legal matters was James Deeley—Mazzei's nephew by marriage.

Bowytz met several months later with Thrifty officials and dissolved all existing franchise agreements, but then approved a new consulting arrangement almost identical to the one declared illegal by Lancaster County Court. The major change was in name—"Thrifty" became "Brewer's Outlet," which is the name the distributors use today.

Bowytz also reduced the penalties against the three Lancaster County outlets from 21-day suspensions to $1,000 fines.

Independent beer distributors have banded together in a suit asking Commonwealth Court to compel the board to enforce the original Lancaster County penalties against the Thrifty operation. The case is pending.

PLAINTIFFS' EXHIBIT 4
COURT OF COMMON PLEAS

FEBRUARY 5, 1976

nsurer, crime link probed by U.S. jury

By William Ecenbarger

HARRISBURG—A federal grand jury investigating the influence of organized crime in the Pennsylvania beer industry is focusing on an aborted underworld attempt to seize control of a tiny Wisconsin insurance company.

The grand jury, holding secret sessions in Harrisburg, is investigating ties between the former Thrifty Beverage chain, which operates about 30 beer distributorships, and the Wisconsin Surety Co., which has been forced into liquidation by the Wisconsin Insurance Department.

The grand jury is following up on information developed over the past year by federal prosecutors, the U.S. Strike Force on Organized Crime, the U.S. Securities and Exchange Commission, postal inspectors and federal tax agents.

In addition, some of the information is under scrutiny by the Pennsylvania Securities Commission and state insurance officials in Pennsylvania and Wisconsin.

Elements of the story have been pieced together by The Inquirer from an examination of court records, contracts and other officials documents in Philadelphia, Harrisburg, Pottsville, Sunbury, Washington, D.C., and Madison, Wis.

The central figure in the inquiry is Morton F. Hulse, a Harrisburg area insurance broker, a principal in Wisconsin Surety who had extensive business dealings with Thrifty.

Two other Pennsylvanians, both cited by the State Crime Commission as Mafia leaders, also figure prominently in the inquiry. They are:

Michael Grasso Jr., an underworld figure in Philadelphia and Miami who tried, but failed, to take over Wisconsin Surety last year. The crime commission said that Grasso specializes in clandestine takeovers of tottering business enterprises. Grasso's uncle is Angelo Bruno, the reputed boss of organized crime in southeastern Pennsylvania.

Joseph Scalleat of Hazleton, Pa., named by the crime commission as a leader of organized crime in northeastern Pennsylvania. Federal agents have evidence of direct financial involvement in Thrifty by Scalleat, and Scalleat's nephew is involved in a Thrifty distributorship.

(See PROBE on 3-B)

Insurer and crime link probed

The grand jury also is seeking to determine whether the two enterprises received unduly favorable treatment in their dealings with the Pennsylvania Liquor Board and the Pennsylvania Insurance Department. The roles of at least two high state officials are being examined. They are:

Gerald Mongelli, a deputy state insurance commissioner who initially supervised Pennsylvania's handling of the Wisconsin Surety liquidation. Mongelli was a member of a law firm that did extensive corporate legal work for Thrifty.

Harry Bowytz, counsel to the Liquor Control Board, who has made several rulings favorable to Thrifty. Bowytz is a protege of former State Sen. Frank Mazzei, who was a behind-the-scenes Thrifty backer before being convicted of extortion and ousted from the Senate last year. Mazzei is now in prison.

The Thrifty chain, which has changed the name of its distributorships to "Brewer's Outlet," has been challenged by independent distributors as an illegal franchising operation, but it has survived because of several favorable decisions by the liquor board.

Wisconsin Surety was heavily involved in writing insurance for public construction projects in Pennsylvania. It was forced into liquidation last April after Wisconsin officials discovered that it illegally issued about $8 million in policies.

Wisconsin officials said the firm has about 600 creditors across the nation, who are owed about $10 million, but they had no breakdown on Pennsylvania creditors. The firm did business in 14 states and Washington, D.C.

Hulse was writing nearly all of Wisconsin Surety's business in Pennsylvania in 1974 when the company hit a cash

crisis, and he invested $150,000 of his own money to gain control of the firm.

He also lined up other potential investors, including Grasso, who was convicted of defrauding the Federal Housing Administration in 1972 and placed on probation.

Grasso formulated a plan to refinance Wisconsin Surety, but Wisconsin insurance officials stepped in.

"No state would knowingly allow money that you would call underworld money to get into reputable businesses—or disreputable businesses—in this state," said an official in Madison.

Last April 11, a Wisconsin court, acting on a request from that state's insurance commissioner, ordered Wisconsin Surety into liquidation.

According to two independent sources, Hulse owns a block of Thrifty stock. Another source familiar with Wisconsin Surety's business operations said that Hulse had written insurance policies for Thrifty.

The Pennsylvania Securities Commission is investigating the transfer of Thrifty stock to Hulse. The transfer occurred despite a 1969 commission rejection of Thrifty's request to sell stock publicly.

The legal work on that request was handled by Pace Reich, a partner in the Philadelphia law firm of Modell, Pincus, Hahn and Reich. Mongelli was a member of the firm at the time, and he and Reich were law school classmates. Mongelli became deputy insurance commissioner last year.

Mongelli said he was unaware of Reich's relationship to Thrifty.

State Insurance Commissioner William Sheppard said "I see nothing wrong with" Mongelli's supervision of the Wisconsin Surety case in light of his former law firm's relations to Thrifty.

PLAINTIFFS' EXHIBIT 5
COURT OF COMMON PLEAS

MAY 2, 1976

How state officials toyed with insurance firm

By William Lambert
Inquirer Staff Writer

The Pennsylvania Insurance Department, charged by the Commonwealth Court with managing a small Valley Forge insurance company, squandered more than $2 million of the company's assets in 19 months, an Inquirer investigation has established.

During that period, which ended last March, Insurance Commissioner William J. Sheppard held title to the firm, Colonial Assurance Co., as statutory liquidator of its insolvent parent, Gateway Insurance Co. of Philadelphia. His deputy, Gerald J. Mongelli, was Colonial's overseer.

Their separate roles in managing the company and its sale in March to a New York man for a bargain-basement price are currently under investigation by federal authorities.

Pennsylvanians ultimately will bear most of Colonial's losses through increased premiums for automobile, fire and homeowners coverage. That is because other insurance companies must pay assessments to meet Gateway's liabilities and are allowed to pass along those costs to policy holders.

Had Colonial been sold quickly, as it could have been, those assets would not have been wasted and could have been used to reduce Gateway's liabilities.

In a lengthy interview late last week, Sheppard and Mongelli told The Inquirer that the department had managed Colonial as "honestly and efficiently as possible," and in complete compliance with the law.

The story of the insurance department's stewardship of Colonial has been pieced together by The Inquirer through examination of official documents, company records and correspondence, and in interviews with former employees, government sources, prospective buyers of the company and insurance industry specialists.

Among the findings:

• When the department took over and began managing Colonial in August, 1974, its net worth was about $5 million. By the time it was sold its value had dropped to about $2.6 million.

• Mongelli once pushed hard to sell Colonial to John DePhillipo, a Philadelphian with reputed organized crime connections, but the department backed away when it learned that DePhillipo's financial angel was tainted by links to organized crime.

• Sheppard and Mongelli received a number of substantial offers for the company from highly reputable bidders but accepted none, and even dissuaded several likely buyers by bureaucratic maneuvering. In at least one case, they refused potential buy-

(See COLONIAL on 12-A)

How an insurance firm lost $2 million . . .

ers access to important financial records necessary to evaluate the company's worth.

• Last fall, as claims mounted, assets evaporated and disenchanted prospective buyers dropped out of the bidding. Colonial quietly stopped writing any new policies and in December quit renewing policies as they expired—actions that were destined to reduce the company's market value.

• Three months ago the department considered selling off Colonial's remaining assets, cancelling its valuable licenses in other states and folding the company altogether because its cash drain was increasing at an alarming rate.

• Under pressure from Sheppard to sell the company or liquidate its assets, Mongelli quickly negotiated its sale to Louis Mazzella, a New insurance broker, at a time when Mazzella's business activities were under investigation by the New York state insurance department.

• Since late in 1974, Mongelli has spent much of his time at Colonial's offices, running the company as if it were his own private fiefdom. With several of Colonial's top officers, particularly through last summer, he lived high off the company's

expense account, enjoying expensive meals and being chauffeured around by company officers in a company-leased Lincoln Continental Mark IV.

• Colonial's corporate insurance business was steered to Mongelli's own personal insurance broker, James Farrell of Philadelphia, by William F. Mack, an executive of Colonial and crony of Mongelli. (The new business, which included property-casualty insurance and employee benefits, provided Farrell $3,000 in commissions last year.)

• Last year Mongelli appropriated some of Colonial's furniture, including several bookcases and chairs (his wife visited the offices to pick it out), and had company employees haul it to his Villanova home, where it was refinished. Meanwhile, it remained on Colonial's fixed assets ledger.

• Early this year, when Mongelli abandoned his Harrisburg apartment, its furniture was moved out in a rented truck by William F. Mack, by then Colonial's acting president, and another employee.

• Mongelli's bedroom furniture was unloaded at Colonial's headquarters and stored there in a previously unused rosewood-panelled office until late in February, when two company employees hauled it to his home.

Gateway collapsed

The Pennsylvania Insurance Department's stewardship of Colonial began with the collapse of its parent, Gateway, in mid-1974, when Sheppard learned that the Philadelphia company had at least a $17 million deficit and possible massive other losses.

On Aug. 21, the Commonwealth Court declared Gateway insolvent, directed its liquidation and vested its title with Sheppard, whom state law designates aas the liquidator for defunct insurance companies.

The reasons for Gateway's failure have not yet been fuully explained. U.S. Postal and Treasury investigators suspect fraud and their findings are in the hands of U.S. Attorney Robert E. J. Curran in Philadelphia, but no indictments have been handed up.

In any case, Gateway's liabilities, which included outstanding claims and unearned premiums owed to policy holders plus huge bank loans, were variously estimated at $50 million to $100 million. But it had one healthy asset—Colonial.

Although Colonial, like Gateway, wrote mostly what the trade calls "nonstandard" insurance—that is, high-risk coverage requiring higher premium rates, much of it in ghetto areas—it was still actively selling car insurance, along with a few fire, homeowners and ocean marine policies.

During Gateway's precipitous decline in 1973, Colonial had lost $572,700 on its insurance business and suffered a paper loss of about $1 million on its securities portfolio, a victim of the depressed stock market. But it still had more than $10 million in assets and a net capital and surplus of $3.5 million.

Then in 1974 things had begun to look up. By the end of July, Colonial's net capital and surplus stood at $4,298,965. On Aug. 28, a week after Gateway's insolvency was declared, Sheppard testified before a Pennsylvania legislative committee that "Colonial . . . is still an ongoing company which has approximately $5 million in surplus."

Colonial finished 1974 with a net operating profit of $830,244. Its paper losses in the severely depressed stock market stood at $964,575, leaving a net capital and surplus that had shrunk to $3.3 million.

Under state management during the last four months of 1974 and early in 1975, however, several decisions were made that were to accelerate the company's financial decline. Among them according to industry specialists asked to comment on The Inquirer's findings, were these:

• In September, 1974, Sheppard authorized Colonial to keep 68 persons on its payroll, part of them to help in Gateway's liquidation, although he himself admitted that the company had more staff than it needed. (His own guidelines for the company set a limit of 35.)

• One of Mongelli's early moves as overseer was to create an encumbrance that was aimed at enhancing the company's

appearance but certain to reduce its value to prospective buyers: he authorizd a five-year lease of expensive and handsome office space in the modern Valley Forge Executive Mall as Colonial's headquarters.

• The lease, which called for annual payments escalating from $64,597 to $74,167 during its five year life, locked in Colonial for at least three years by prohibiting cancellation altogether until March 1978, and permitting it thereafter only if a penalty of $33,350 were paid.

• The move from downtown Philadelphia to Valley Forge, which cost at least $22,000, was completed in February, 1975. When the company's employees settled in they found the 9,570 square feet of space large enough to provide the equivalent of a 20-by-14-foot office for each, including officers, secretaries and file clerks.

• The furniture moved to Valley Forge was owned by a bankrupt sister company, and Mongelli negotiated its purchase by Colonial. He got a bargain, paying $28,000 for furniture worth nearly $100,000. There was only one catch—his purchases equipped the company for 54 employees when nowhere near that many were contemplated.

• Although an excess of nonstandard auto insurance written by Colonial had been one of its serious problems, board meeting minutes show that in the fall of 1974, to avoid "hardship for either brokers or insureds," the company violated its state-set guidelines and wrote up to $200,000 more of that high-risk business than it had contemplated.

• Colonial continued to write nonstandard policies well in 1975, and in June alone put about $300,000 worth of such dubious business on the books, before Sheppard finally ordered a halt to the practice. In July the company quit writing all auto insurance except for renewals, thus assuring a drop in its revenues.

• Sheppard failed in his attempts to persuade additional states to license Colonial for operations, which would have increased the company's value, and Mongelli privately voiced his embarrassment at that failure.

The puzzle

Those questionable management decisions and Sheppard's failure to get new licenses intrigue industry specialists—but not nearly so much as another Sheppard action: The failure of the commissioner, as statutory liquidator, to move as quickly as possible to sell Colonial as a functioning company to some reputable buyer for as much cash as he could get.

There was no shortage of offers. They began pouring in as soon as word spread through the industry that Colonial was for sale. Some would-be buyers were not so reputable. Others lacked ready cash and wanted to buy the company on the installment plan. But several had plenty of cash as well as impeccable reputations.

Yet the insurance department dawdled and kept turning aside offers, often to the puzzlement of the offerers, for more than a year and a half.

Just how much Sheppard concerned himself directly with Colonial's affairs during the 19 months its decline continued apace has not been established. What is apparent is that Mongelli took part in every prospective deal, often negotiating directly with the offerers.

Curiously, Mongelli's qualifications for his job seem, at best, limited. He has told a number of acquaintances, including the representative of a prospective buyer of Colonial, that he knew very little about the insurance business.

Yet he was hired by Sheppard in June, 1974, at a salary of $25,819 a year, as deputy commissioner, with a broad range of responsibilities covering most of the operational functions of insurance company regulation. (He now earns $29,614 a year.)

Mongelli, 46, is a lawyer. If he has a specialty it appears to be liquor law.

From October 1961 to August 1970, he held a part-time job in the Philadelphia city solicitor's office at $9,787 a year and practiced law on the side. At the time of Mongelli's appointment, Governor Shapp's office said in a press release that the new deputy's earlier duties as assistant city solicitor "were

primarily in the areas of insurance company regulation and consumer protection." The solicitor's office, however, doesn't regulate insurance companies. The state does. Moreover, fellow employees at city hall recall that Mongelli's principal duties there concerned liquor licensing matters.

Before joining the insurance department, Mongelli was a member of the Philadelphia law firm of Modell, Pincus, Hahn and Reich, which has a wide practice in liquor law.

Indeed, his one-time membership in that firm and his subsequent handling as deputy commissioner of another defunct insurance company unrelated to Colonial had already brought Mongelli under the scrutiny of federal investigators and a grand jury in Harrisburg.

That grand jury had begun investigating an aborted attempt by organized crime figures to buy control of the troubled Wisconsin Surety Co. just before it collapsed into insolvency.

Wisconsin Surety had been linked to the Thrifty Beverage beer chain, which in turn had connections itself with organized crime.

Mongelli had been a member of the Modell law firm some years earlier when it represented Thrifty Beverage in a stock sale application before the Pennsylvania Securities Commission. Later, as Sheppard's deputy, he had initially supervised the state's liquidation of Wisconsin Surety.

Although Mongelli disclaimed knowledge of the law firm's association with Thrifty, the account had been handled by his former law school classmate and a partner in the firm, Pace Reich.

The Harrisburg inquiry is still underway, and The Inquirer has learned from sources close to it that a key figure under investigation was also involved in an unsuccessful underworld attempt to buy Colonial.

He is Morton F. Hulse, a Harrisburg area insurance broker, once a principal in Wisconsin Surety, who also had had extensive business dealings with Thrifty Beverage.

Sources say that Hulse was involved early last year in a scheme whereby Michael Grasso Jr., an exconvict and

nephew of Philadelphia Mafia boss Angelo Bruno, would arrange to put up the front money to buy Colonial through John DePhillipo, a Philadelphia businessman who was a friend to both Grasso and Michael Bruno, Angelo's son.

An early bidder

Documents made available to The Inquirer show that DePhillipo was among the early bidders for Colonial, and that his proposal was considered acceptable. They do not reveal his offering price, but other sources placed it at about $2 million, with the state retaining a part of the company's securities portfolio for direct sale.

DePhillipo was the only one of several serious offerers who insisted on using Colonial in part to write surety bonds. Interestingly, the writing of surety bonds for Wisconsin Surety had been a Hulse specialty.

The minutes of a Colonial directors' meeting of Mar. 27, 1975, identified DePhillipo as having "extensive holdings in land development and building corporations." There is no mention of his insurance experience, if any.

Of a later meeting on May 9, which both Sheppard and Mongelli attended, the minutes reported that DePhillipo's offer was "all cash, up front," and that he had submitted a letter of intent to buy and a contract. They went on:

"Commissioner Sheppard then confirmed his desire to sell the company as soon as possible, however, he is obligated to get the best price ... After considering all factors, Mr. DePhillipo's offer satisfies both obligations. If he gets a bank commitment, immediate steps should be taken to finalize a contract and to obtain Court approval for the sale ..."

Sheppard and Mongelli were on the verge of closing the deal with DePhillipo when the department learned that he proposed to get the cash from an Ohio savings bank that legally was not permitted to lend money for such a purpose.

Mongelli says DePhillipo was turned away only because he "couldn't come up with the money."

Whatever the shortcomings of DePhillipo's offer, there were other offers with obvious merit. (Last November, Shep-

pard wrote to one prospective buyer that he had "hundreds of applicants expressing interest . . .")

The first offer, in the fall of 1974, had come from Abe Lieber, a New Yorker identified by Colonial insiders as an exporter-importer. Board meeting minutes indicate he offered $3.2 million, with an unspecified down payment and a "relatively short payoff period." But Lieber fell ill, and the proposal languished, never to be accepted.

In May, 1975, the minutes put the "latest offer" at $3,332,000, although they do not specify who made it. Mongelli told the Inquirer the offer came from DePhillipo.

Of the many prospective bidders, three were highly respected companies with plenty of cash. Although one was to withdraw from the bidding and the other two were to be rejected (neither to this day understanding why), all three believed they had been treated cavalierly by Sheppard's department.

None of the three initially sought out Colonial. Rather, each was approached by Donald Pahl, a member of a Philadelphia insurance counseling firm, who asked for a finder's fee of $100,000.

One company, Phoenix Mutual Life of Hartford, Conn., sought to enter the property-casualty field and asked the New York insurance department if it knew of any existing companies

(Continued on Next Page)

. . . while the state ran it for 19 months

for sale. Colonial was mentioned.

But before Phoenix got around to approaching the Pennsylvania department, Pahl telephoned a company officer and offered himself as the intermediary for a $100,000 fee. Though a Phoenix Mutual spokesman declined to give details of its negotiations, other sources said the company offered Pahl only $5,000.

Phoenix Mutual retained the accounting firm of Price Waterhouse to evaluate Colonial, and in July, 1975, it estimated the company's worth at $3.4 million.

The Connecticut company, however, became frustrated by the insurance department's failure to negotiate reasonably, the sources said. It broke off negotiations and decided to organize its own property-casualty company.

Another hot prospect was the W. R. Berkley Corp. of New York city. In a telephone interview, W. R. Berkley said his firm, a holding company owning several insurance companies, was "ready, willing and able" to buy Colonial.

'Had the money'

"We had the money," Berkley said. "Our offer was that we would pay the fair-market value based on an appraisal of the assets. We would have deducted the finder's fee to Pahl from our appraisal in our offer.

"We thought they (the department) were going to sell the shell of the company and some assets and we would get the licenses in about 17 states. Our only problem was that they wanted to keep Colonial in Pennsylvania."

Berkley said that as of October, 1974, Colonial was worth just over $4 million. Its capital and surplus on Oct. 31 was $3,555,784.

(A company's capital and surplus total, according to industry sources, is generally considered the low end of its sale value. In determining total worth, additional values are assigned to existing licenses in various states, to physical assets such as furniture, to about 35 percent of premiums paid in advance by policy holders, and to good will, if any.

(Colonial had very little "good will" for sale because of its public association with the defunct Gateway, and of course its assets, which consisted primarily of its stock-and-bond portfolio, varied with the ups and downs of the market.)

"I don't know what happened to the deal," Berkley said. "It was clear that there was no great anxiety on the part of the insurance department to sell Colonial. We never got around to making a firm offer, and we never heard from them again."

If the department's reception to the Phoenix Mutual and Berkley proposals could be reasonably described as less than warm, Mongelli and Sheppard's attitude toward the offer of Charter National Insurance Co., an Arkansas-chartered com-

pany headquartered in St. Louis, might be viewed as ranging from cool to downright hostile.

Charter National is a subsidiary of the American Investment Co., which also owns a life insurance company.

When Pahl approached Charter National early in 1975, he found a company anxious to enter the property-casualty business in the East and more than willing to buy Colonial with its licenses to operate in 16 states and the District of Columbia.

Robert J. Reid, Charter National's executive vice president, got the approval of the parent firm's directors and began negotiations in April with Jack N. Schreihofer, then Colonial's president.

"We desperately wanted the company and we were prepared to pay at least its fair market value, $3.3 to $3.7 million, whatever it might be," Reid told The Inquirer.

Late in May, Reid met Schreihofer at Colonial's offices. Reid recalled the events of that day:

"Schreihofer said I could talk to Mongelli and that's when things started getting a little weird. He introduced me to Mongelli, ushered us into a conference room, and then he excused himself and said the two of us could talk. He walked out and shut the door.

"Mongelli started ranting and raving, saying he wasn't really an insurance expert, that he was under a lot of pressure from the department and the press, and that the department didn't like insurance companies that were owned by financial companies.

"I told him we needed to know about Colonial's financial condition, that we would pay at least the market value of the company and if the department got into negotiations with others we might pay a premium. We were anxious to buy.

"Mongelli wanted to know whether we intended to protect the people working there, and I assured him we would need local employes. I also assured him that we would not cancel out the business (existing policies) wholesale.

"Mongelli then started explaining why they had signed a five-year lease for the offices. I couldn't understand why he

was so insistent on defending the lease because I hadn't raised any question about it.

"Of course they had too much space and our plan was to see if we could sublease some of it or buy out of the lease. They had almost 10,000 square feet, and (by then) only 23 employes.

"The whole discussion was strange. All in all, it was a pretty paranoid performance."

But, as Reid went on to explain, his meeting with Mongelli was just the beginning of a series of peculiar performances and arcane maneuvers by insurance department representatives.

On May 29, John S. Hughes, an attorney for American Investment, Charter National's Parent, wrote Sheppard a "letter of intent" to buy Colonial.

Although it did not state a price, it specified that cash only would be paid, some protection would be provided for Charter National against contingent liabilities that might not be immediately discernable, and that the Commonwealth Court as well as Sheppard would determine the fairness of the offer.

It also made clear that the $100,000 finder's fee to Pahl would be paid separately from the offer, which Berkley earlier had been unwilling to do.

Charter National said it would keep the company in Pennsylvania, which appeared to be Sheppard's desire. The plan was to merge Charter into Colonial, with the latter's name retained.

For the next two-and-a-half months, Charter National representatives found themselves engaged in a game of hide-and-seek with insurance department officials, beginning when Reid, Hughes and another company lawyer, Charles J. Meler Jr., tried to get permission to examine Colonial's financial records.

"We would telephone Harrisburg and ask for Mongelli, only to be told he was in Philadelphia," Reid said. "Then we would call Philadelphia and they would tell us he was in Harrisburg. Finally we found that by calling Schreihofer we could

get a message to Mongelli and Mongelli would call us back—sometimes."

Sheppard and Mongelli finally gave in to Charter National's pressure, and on Aug. 14 Meler started a two-day examination of Colonial's files. He found that its records prior to September 1974 had been impounded by postal authorities who were investigating Gateway.

At first, Mongelli agreed to permit inspection of the missing records, and Postal Inspector Richard McGee, who had custody of them, had no objection. But on Oct. 1, despite Meler's repeated pleas that he needed to determine if the impounded documents concealed any contingent liabilities, Sheppard refused access to them.

Finally, in mid-November, Meler received a letter from Sheppard which contended that Charter National had failed to supply information to the department necessary to complete the sale and had neglected to meet "guidelines" for the purchase.

When Reid saw Sheppard's letter he was furious. "I suspect Mongelli wrote it for Sheppard's signature," he said. "Anyway, it was full of misstatements. I felt we had to correct the record so I wrote a letter to Sheppard."

Reid angrily took Charter out of the bidding for Colonial. He told Sheppard:

"Knowing the bureaucratic roadblocks that you have at your disposal, we are not going to waste any more of our time and money attempting to acquire a company that in fact has decreased in values since we first looked at it . . ."

Then he offered Sheppard some advice:

Sheppard's defense

"To avoid further embarrassment to the Pennsylvania Insurance Department, I would strongly urge you to abandon your attempts to sell Colonial and liquidate it before it costs the industry and the taxpayers of Pennsylvania any more money."

Sheppard told The Inquirer that the Arkansas insurance commissioner had discouraged him from negotiating a deal with Charter National because "it was in very bad shape."

However, deputy insurance commissioner Ernie Fennell of Arkansas said in a telephone interview that the "financial problems of Charter National were not discovered until after it had suspended negotiations with Sheppard."

Said Fennell: "These (Charter National) are honest folk. Charter National didn't know they were in trouble as a result of the failure of a company they were doing business with. When we told them, they immediately added $5 million in cash to their reserves."

Nonetheless, Sheppard might profitably have followed Reid's suggestion, because Colonial drifted rapidly downward during the closing months of 1975 and into the early part of this year.

The year-end financial report was prepared for filing in Harrisburg and it told the story in stark outline:

At the end of 15½ months of department ownership, Colonial's surplus had fallen from $5 million to $3 million. Put another way, under state stewardship its assets shrank at the rate of over $30,000 per week. In 1975 it lost $616,575 through operations, another $72,300 in "non-admitted" assets—mostly uncollectible premiums from agents and brokers—and $19,000 in excess surplus funds.

Only an upturn in the stock market, which gave the company a paper gain of $425,000, prevented the year from being disastrous. But as it developed, the bottom wasn't yet in sight.

Industry specialists asked by The Inquirer to comment on Colonial's 1975 report expressed surprise at what they saw as an unwarrantedly high figure for salaries paid by the company during a year in which it earned premiums of only $1 million. With fringe benefits, those salaries totaled about $400,000. (At year's end Colonial's payroll numbered 17 employes, including clerks and secretaries.)

Rent and "rent items" totaled $85,593. The costs of physically moving Colonial to Valley Forge were listed at $10,415, but another $55,694 reported for printing and stationery included a large figure for new letterheads and forms needed to reflect the new address.

Then there was an item none of the industry sources

could explain, considering Colonial's financial position and its purported impending sale: $49,228 for travel expenses. Sheppard and Mongelli told The Inquirer last week that they couldn't explain it either.

As it became apparent that Colonial's financial condition was grave, insiders said, an air of desperation pervaded the plush Valley Forge offices, now mostly empty. By last January, the company's 17 remaining employees were engaged mainly in busy-work. There was little else to do.

In mid-February all but five employees were given dismissal notices.

Mongelli wondered aloud to associates how the press would react if Colonial's situation were to become public.

He made decisions and then revoked them, confusing employes. First, policy cancellations were to be speeded up and licenses in other states abandoned; then that was halted just as it got underway. A plan to sell Colonial's assets and put it out of business was considered, then dropped.

One thing was clear: the free-spending days were over. The happy expense-account lunches with Mack and Schreihofer and other company officers since departed were a thing of the past. Instead of being chauffeured by Mack in a luxury company car, Mongelli now showed up driving his own brand-new Cadillac.

Colonial's cash flow had dwindled to a trickle. Its loss ratio—the measure of the amount it is paying in claims against its premium income—had shot up from an acceptable 71 percent in May, 1975, to a debilitating 187 percent in February, 1976.

Securities in the company's assets portfolio were being sold to pay policy claims as well as salaries and other operating expenses. Early in March, one such sale alone resulted in a loss of $142,000 to Colonial because certain of the bonds sold were depressed in value.

From Dec. 31 to last Feb. 29, Colonial's capital and surplus plunged from $3,049,529 to $2,576,302.

The situation was grim. But waiting in the shadows, where he had been for months, was one remaining prospective buyer: Louis Mazzella. Why he was still around has been the subject of some cynical speculation within the department, since his earlier proposals had not been given much weight.

But now, insiders said, he seemed to offer a lifeline to the foundering Mongelli, who later told The Inquirer, "we resurrected him."

Mazzella's plan was to buy Colonial and put it, along with his Senteninel Brokerage Corp. and Sentinel Claims Adjusting Co. of Locust Valley, N.Y., under the umbrella of a new holding company call COLINCO (Colonial Investment Co.).

There was the question of money, but that could be resolved. After months of dawdling with other prospective buyers, the insurance department sprang to action. In a matter of weeks, Mongelli negotiated a deal with Mazzella and it was approved by Sheppard.

Mazzella bought Colonial, and what a bargain he got.

On March 3, Mongelli convened a meeting of Colonial's board to amend the company's charter. Its capital stock of $2 million—10,000 shares at $200 each—was cut to $300,000 by reducing the required number of shares to 1,500. Its paid-in surplus was set at $200,000. On March 10, Mazzella then bought the capital and surplus for its newly-established bottom-line figure—$500,000—and paid for it in cash.

For his cash, Mazzella also got Colonial's $23,000 worth of furniture, its valuable licenses in Pennsylvania and more than a dozen other states, and securities valued at $1,271,547, part of which the department in effect wrote off against expected future claims liabilities and other expenses of Colonial.

The insurance department for its part took over what remained of Colonial's securities portfolio, worth $2,248,163. Thus, with Mazzella's checks for $500,000—and with last-minute adjustments—the department netted $2,599,383, to be used in reducing Gateway's liabilities.

The department also got a dubious additional "asset," Colonial's accounts receivable, which at the date of sale consisted of $33,854 in premiums due from insurance agents.

Although Sheppard disagreed, insiders said these were virtually uncollectible because agents were simply refusing to pay up, and under the terms of his purchase contract with the department, Mazzella is not required to guarantee their collection.

For Mazzella, the deal also frees him of one windfall surely to be costly and handed him another potentially profitable.

First, instead of buying the common stocks from Colonial's investment portfolio, which was priced much higher than it had cost when purchased years ago, he got Sheppard's agreement that those stocks would be retained and sold by the department.

That relieved him of the need to come up with the huge amount of cash the stocks were worth. More important, it freed him of any obligation to pay the company's federal capital gains taxes on those stocks.

And second, he acquired Colonial's 1975 book loss of $723,972, worth, at the corporate tax rate of 48 percent, about $351,000 when used as a tax loss carryover against Colonial's earnings through 1980.

Thus, on the first $723,972 that Colonial earns in profits during the next five years, Mazzella will pay taxes of zero instead of $351,000. That is one thing his $500,000 bought him. So, in effect, he will have acquired the company at an actual out-of-pocket cost of $149,000.

PLAINTIFFS' PROPOSED POINT FOR CHARGE NO. 28
COURT OF COMMON PLEAS

28. Plaintiffs contend that the defendants published articles in their newspaper which falsely asserted that the Thrifty chain had been banished by order of the Court of Common Pleas of Lancaster County; that State Senator Frank Mazzei, a convicted felon, used improper and illegal political influence to allow the Thrifty chain, in which he owned an interest, to continue to do business despite the fact that it was operating in violation of state law; that Senator Mazzei's motivation for protecting the Thrifty chain was not limited to his financial interest in the business, but also extended to the fact that the chain had a variety of ties to the Mafia through one Joseph Scalleat and others (and may even have been a Mafia-front organization); that Senator Mazzei himself was close to or owed allegiance to the Mafia; and that the Thrifty chain itself was closely connected with the Mafia and organized crime.

Plaintiffs contend that all of the above assertions are false. Defendants do not deny publication of these articles. Defendants have claimed, however, that the articles are true. Truth is a defense to a libel action. However, the burden is upon the defendants to prove by a fair preponderance of the credible evidence that at the time the articles were published, the articles, taken as a whole and in context, were true. *CORABI v. CURTIS PUBLISHING CO.*, 441 Pa. 432 (1971). 42 Pa. C.S. §8343(b).

PLAINTIFFS' PROPOSED POINT FOR CHARGE NO. 59
COURT OF COMMON PLEAS

59. In producing evidence in support of their contentions, defendants did not call any editor to testify concerning the scope of the editorial review given to these articles, they did not call any witnesses concerning plaintiffs' damage presentation, and they did not call as witnesses any sources other than Richard Doran. In particular, defendants did not call as a witness either Alexander Jaffurs or Edward Hussie. The general rule is that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so, an inference may be drawn that the evidence if produced would be unfavorable to him. The failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of that party. However, the rule is not operative unless it appears to you that the absent witness has peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him, and it must first appear that this knowledge exists before the rule can be invoked.

Your inquiry on this point will be: (1) Is the absent witness available, or has his absence been satisfactorily explained? (2) Does the absent witness possess peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him? If the witness is available and does possess such peculiar knowledge, then the jury may infer from the fact that he was not called that if he had been produced his testimony would have been unfavorable to the party whose duty it was to call him.

Laub, Trial Guide, §596.

PLAINTIFFS' PROPOSED POINT FOR CHARGE NO. 60
COURT OF COMMON PLEAS

60. Under the law of Pennsylvania, members of the media have a statutory right, which defendants have chosen to exercise in this case, to refuse to identify certain sources of information upon which they claim their articles were based, at least in part. The obvious impact of defendants' exercise of that statutory right in this case has been that plaintiffs were unable to question those sources, to determine their reliability or lack of reliability, to learn from the sources themselves what it was that they told to defendants, and otherwise to fully cross-examine those sources and probe their credibility and that of the reporters who relied upon them. You the jury may consider both defendants' decision to exercise this statutory right, and the effect that it has had upon plaintiffs' presentation at this trial as described above, in reaching your verdict. In other words, it is for you to decide what inferences, if any, should be drawn from defendants' failure to identify certain sources. You may infer, as you deem appropriate, that the defendants were simply endeavoring to protect their sources, or you may infer that, if the sources had been identified, that would have enabled plaintiffs to develop evidence adverse to defendants concerning the truth of the information supplied, and the existence, reliability and credibility of the sources.

DEFENDANTS' PROPOSED POINT FOR CHARGE NO. 10

COURT OF COMMON PLEAS

10. Finally, in order for plaintiffs to establish defamation, they must prove by a preponderance of the evidence that the articles were false. *Wilson v. Scripps-Howard,* F.2d , 7 Med.L.Rptr. 1169 (6th Cir. 1981); *Medico v. Time, Inc.,* 643 F.2d 134. 146, n. 40 (3d Cir. 1981); *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264, 274 n. 49 (3d Cir. 1980). *See also, Gertz v. Robert Welch, Inc.,* 418 U.S. 323, n. 10 (1974); *Time, Inc. v. Firestone,* 424 U.S. 448, 458 (1976). RESTATEMENT OF TORTS, SECOND, §580B, comment (J).

DEFENDANTS' PROPOSED POINT FOR CHARGE NO. 66

COURT OF COMMON PLEAS

66. The law of this Commonwealth provides that a newsman need not disclose the source of any information obtained in the gathering of news. The basis for this rule is the widespread common knowledge "that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty . . . [or] crimes committed or possibly committed by public officials or by powerful individuals or organizations unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion."

For this reason, I charge you that the newsreporters in this case had the absolute right and duty to refuse to divulge the sources of their information and to refuse to produce their notes and drafts. You are to draw no adverse inferences because this right was exercised. *In Re Taylor,* 412 Pa. 32, 41 (1963); *Hepps v. Philadelphia Newspapers, Inc.,* 3 D.&C.3d 693 (1977).

JURY CHARGE, COURT OF COMMON PLEAS

* * *

[3815]* Ladies and gentlemen, you have heard counsel use the term "burden of proof" several times. This is a most important concept and I would like to discuss it with you in some detail.

The plaintiffs, Ladies and Gentlemen, commenced this lawsuit, and it is therefore the plaintiffs upon whom rest the burden of proof with respect to their claims against the defendants. There is no burden of proof upon the defendants of any kind, with one exception—which we will discuss later.

The defendants have advanced a defense with respect to certain statements allegedly set forth in one or more of the articles known as the defense of conditional privilege.

The defendants therefore have the burden of proof with respect to the defense of conditional privilege, and I will discuss it a bit later, as earlier noted.

Returning, then, to the burden of proof upon the plaintiffs. Remember again that the party who commences the lawsuit has the burden of proving those claims that party makes against the defendants in the suit.

When a party has the burden of proof on a particular issue or issues, that party's position on [3816] that issue must be established by a measure or standard that we call a fair preponderance of the evidence.

That, then, as we say, is a measure or standard that the plaintiffs must meet—a fair preponderance of the evidence. Let us examine this rule.

The term "fair preponderance of the evidence" means evidence which when weighed against the evidence opposed to it has a more convincing force and the greater possibility of truth. Let me say that again.

The term "fair preponderance of the evidence means evidence which when weighed against the evidence opposed to

*Numbers appearing in brackets refer to the page numbers of the original trial transcript.

it has a more convincing force and the greater possibility of truth.

If it does not have such force or weight, or if it weighs so evenly with the evidence against it that you the jury are unable to say that there is a preponderance on either side, then your finding or verdict upon that issue must be against the party who has the burden of proof and in favor of the opposing party.

* * *

[3817] The term, fair preponderance of the evidence, means evidence which, when weighed against the evidence opposed to it has a more convincing force and the greater possibility of truth. If it does not have such force or weight, or if it weighs so evenly with the evidence against it that you the jury are unable to say that there is a preponderance on either side, then your finding or verdict upon that issue must be against the party who has the burden of proof and in favor of the opposing party.

Let us put it another way if you will.

Think of an ordinary balance or scale with a pan on either side. You have often seen that legendary lady wearing the blindfold and holding the scales of justice. Visualize and keep those scales in mind if you will in order to decide whether the party with the burden of proof has carried that burden of proof on the issues upon which that party has the burden of proof.

After considering all of the credible evidence—that is, the truthful and accurate evidence in this case, if you feel that the evidence presented by the party who has the burden of proof on a particular issue tips the scales in his favor, then that party has met or carried his burden of proof on that [3818] issue. On the other hand, if you feel that the evidence produced by the party not having the burden of proof tips the scales in his favor, then obviously the party having the burden of proof on that issue has not met his burden of proof.

Finally, if the scales are equally balanced, then the party having the burden has not met that burden, because the party having the burden, remember, must tip the scales in his favor.

* * *

[3830] Members of the Jury, the cause of action, or a civil action, as this case is called, is composed in all cases of a number of elements or parts. I am about to instruct you upon each of the elements or parts constituting an action founded upon defamation or libel—which I will refer to from then on as a "cause of action in libel". But, before doing so, I will remind you that although there are a total of nine plaintiffs, you must consider the case of each plaintiff separately when considering whether the plaintiffs have carried their burden of proof.

Before a particular plaintiff may recover [3831] from the defendants, that particular plaintiff must prove each of the elements of the libel action by a fair preponderance of the evidence, and that particular plaintiff must also prove actual, or as we sometime call it, compensatory damages, to himself or itself, again, by a fair preponderance of the evidence.

Although I have referred to and will continue to refer to the plaintiffs as a group or class, remember again, you must consider the case of each plaintiff separately with respect to the questions of whether a particular plaintiff has proven each element of the libel action by a fair preponderance of the evidence, and, that particular plaintiff's damages, again, by a fair preponderance of the evidence.

Unless a particular plaintiff has proven each of the elements by a fair preponderance of the evidence as to that particular plaintiff, your verdict as to that plaintiff must be in favor of the defendants and against that particular plaintiff, and although you find that a particular plaintiff has proved each and every element of a libel action, unless you also find that such plaintiff has proved his or its actual or compensatory damages by a fair preponderance of the evidence, then that particular plaintiff cannot recover any damages from the defendants.

[3832] So saying, let us examine the cause of action in libel.

Members of the Jury, there are eight elements or parts constituting a libel action, and the plaintiffs must prove each

and every one of the eight elements by a fair preponderance of the evidence in order to prevail. Must tip the scales in his or its favor.

* * *

[3848] We turn then to an examination of the sixth element of the libel action.

To prove the sixth of the eight elements of the libel action, the plaintiffs must prove to you by a fair preponderance of the evidence that the allegedly defamatory statements contained in the articles, were false. Once again and quite simply:

To prove the sixth of the eight elements of the libel action, the plaintiffs must prove to you by a fair preponderance of the evidence that the allegedly defamatory statements contained in the articles, were false.

Thus, as a general proposition, if a defamatory statement is true, Ladies and Gentlemen, it cannot form the basis of an action in libel no matter how defamatory, if true, it cannot form the basis of an action in libel.

It is not necessary that a statement be literally true in every detail in order that it be considered not to be false so long as the statement is [3849] substantially true. Nor do minor inaccuracies or the omission of minor details render an otherwise truthful statement false. Nevertheless, although individual statements in an article may be literally true, if the article conveys a defamatory meaning by implication and innuendo, which meaning is false, then insofar as the law is concerned, the article is false.

Once again: Although individual statements in an article may be literally true, if the article conveys a defamatory meaning by implication and innuendo, which meaning is false, then insofar as the law is concerned, the article is false.

The proof of falsity thus must be directed at the gist or sting of the defamation. The test is whether the alleged libel, as published, would have a different effect on the mind of the reader than the truth would have produced.

Remember again, if defamatory implications and innuendo produced by an article are false, the literal truth of each

fact asserted in the article will not render the article true where the article read in its entirety implies additional defamatory statements.

In order to carry their burden with [3850] respect to the sixth element, then, the plaintiffs must prove by a fair preponderance of the evidence either that a defamatory statement in an article was false, or that while true, the statements in an article conveyed a defamatory meaning by implication and innuendo, which defamatory meaning was false.

I further instruct you, Members of the Jury, that in addition to your finding a statement or article to be false, you must also find that the false statement or article is defamatory.

It is proof of a false defamation by a fair preponderance of the evidence that the plaintiffs must show in order to prove the sixth element. Proof of a false defamation. It must be false. It must be defamatory. Mere proof of falsity without defamation is not sufficient, and proof of defamation without proof of falsity of the defamation is also not sufficient. Proof of a false defamation.

Remember, again, our definition of defamation, as given to you in the first element.

If the plaintiffs have failed to prove falsity as I have used that term, by a fair preponderance of the evidence, then your deliberations will cease, and once again, you will return verdicts in favor of [3851] the defendants and against the plaintiffs.

If on the other hand you find that the plaintiffs have proved the sixth element—falsity of a defamatory statement or article—by a fair preponderance of the evidence, you will then consider the seventh element of the action in libel—the element of fault on the part of the defendants.

As is obvious to you, Members of the Jury, we are here dealing with a lawsuit by a private person and private corporations against a newspaper. The newspaper, the Philadelphia Inquirer, is in some respects protected in its right to publish news stories by the First Amendment to the Constitution of the United States. In other words, the newspaper is privileged to do so. That privilege is conditional however, rather than

absolute, and even though a newspaper is protected in its right to publish by the First Amendment, it may be subjected to liability in a libel action if it publishes erroneous or false information which libels or defames a plaintiff, provided the plaintiff proves that when it published the libelous or defamatory material, the newspaper did so with fault.

We will discuss the degree and nature of fault the plaintiffs must establish by of course [3852] a fair preponderance of the evidence in order to carry their burden of proof with respect to this seventh element.

We begin our examination of this conditional or qualified privilege—that is, the privilege of a newspaper to publish with the general proposition that newspapers as publishers of news stories and articles are guaranteed the right to do so by the First Amendment as we have said. This right is constitutionally protected, even though it may be on occasion abused by publishers.

As James Madison, later to become President Madison, said nearly two hundred years ago, Ladies and Gentlemen, and I quote it:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press."

End of quotation.

Nevertheless, the people of this great nation have ordained in the light of history that in spite of the probability of excesses, abuses and falsehoods, the freedom of the press to publish is essential to the freedom of this nation itself. It is also fundamental that erroneous statements and [3853] falsehoods are inevitable in a free press, regrettable as such inevitability may be, and punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutional guaranteed freedoms of speech and press.

Our law recognizes that a rule of strict liability that compels a publisher to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship as the only alternative to liability.

Allowing the news media therefore to avoid liability only by proving the truth of all libelous statements does not accord adequate protection to First Amendment liberties that we discussed. Thus, the First Amendment requires that we protect some falsehood in order that we may ultimately protect important speech and communication.

At the same time, however, Members of the Jury, there is indeed a legitimate interest underlying the law of libel in Pennsylvania, and it can be briefly summarized as compensation of individuals for the harm inflicted upon them by defamatory falsehood.

As one of our great Supreme Court justices in Pennsylvania aptly put it a few years ago:

> [3854] "A man's good name is as much his possession as his physical property. It is more than property. It is his guardian angel of safety and security. It is his lifesaver in the sea of adversity. It is his parachute when he falls from the sky of good fortune. It is his plank of rescue in the quicksands of personal disaster."

The individual's right to the protection of his own good name thus reflects our basic concept of the essential dignity and value of every human being.

As you can easily observe, then, some tension or conflict exists between the need to protect and foster a free, vigorous and uninhibited press on the one hand and the legitimate interest in compensating those persons wrongfully injured by the press on the other hand.

Our law has endeavored to strike a balance between these important and competing interests. In dealing with the plaintiffs' demand for the recovery of damages, a term I will define for you shortly, you are instructed that in order to prove the sixth element of the action in libel in this case, because of the constitutional privilege enjoyed [3855] by the Philadelphia Inquirer, as I have just described it to you, the plaintiffs, to prove by a fair preponderance of the evidence this seventh element, must prove again by a fair preponderance of the evi-

dence that the allegedly false and defamatory article or articles were written and published negligently—that is, written and published by the defendants without the exercise of reasonable care on the part of the defendants to determine whether the defamatory article or articles was or were true or false.

That's a rather long sentence. Let me repeat this important concept for you.

The plaintiffs, in order to prove by a fair preponderance of the evidence the seventh element of their libel action, must prove to you by a fair preponderance of the evidence that the allegedly false and defamatory article or articles were written and published negligently—that is, written and published by the defendants without the exercise of reasonable care on their part to determine whether the defamatory article or articles was or were true or false.

Let us examine carefully that word, "negligence". Again, the plaintiffs' case, remember, is based on the theory of negligence.

[3856] The legal term, "negligence", Members of the Jury is defined as the absence of reasonable care which a reasonably prudent or careful person would exercise in the circumstances presented in this case. Again:

The legal term, "negligence", is defined as the absence of reasonable care which a reasonably prudent or careful person would exercise in the circumstances of this case.

Negligent conduct then may consist either of an act or an omission to act when the circumstances give rise to a duty to act. In other words, Members of the Jury, negligence is the failure to do something which a reasonably prudent person would do, or negligence is the doing of something which a reasonably prudent person would not do in light of all the surrounding circumstances established by the evidence in this case. Again:

Negligence is the failure to do something which a reasonably prudent person would do; or negligence is the doing of something which a reasonably prudent person would not do in light of all the surrounding circumstances established by the evidence in this case.

[3857] You will note again in the context of this case that negligence is defined as the absence of reasonable care which a reasonably prudent or careful person would exercise in order to determine whether a defamatory article was true or false before writing or publishing that article.

You the Jury must decide whether the defendants exercised reasonable care in determining whether a defamatory article or articles were true or false. Remember again, "reasonable care" is defined as that care a reasonably prudent or careful person in the circumstances presented in this case would have exercised to ascertain if a defamatory article or articles was or were false before publishing that article or those articles.

You will also recall that one who fails to exercise such reasonable care is in the law, negligent. Thus, if you find a defendant or defendants failed to exercise the care a reasonably prudent and careful person would have exercised in the circumstances to ascertain whether a defamatory article was true or false, by a fair preponderance of the evidence, "care" known as "reasonable care" then you should find such defendant negligent.

On the other hand, if you do not find by [3858] a fair preponderance of the evidence that a defendant or defendants failed to exercise reasonable care in the circumstances to ascertain whether a defamatory article was true or false, then you will find such defendant or defendants not negligent.

Remember as well, when you come to consider the defendant, Mr. Ecenbarger, that he did not participate in the preparation of Exhibit P-5, and that the defendant, Mr. Lambert, did not participate in the preparation of Exhibits P-1, P-2, or P-4. Each of the reporter-defendants may only be held accountable for the article each wrote or assisted in writing.

In order to determine whether the defendants were negligent—that is—failed to exercise reasonable care to ascertain the truth or falsity of a defamatory article or articles, you can and should rely upon your experience and knowledge of human affairs in deciding whether a reasonably prudent person would have acted as the defendants did in investigating

and publishing the articles, given the circumstances of this case.

You may also consider other factors in determining whether the defendants acted as reasonable prudent persons under the circumstances in publishing [3859] a defamatory article on the basis of a check or lack of check as to the accuracy and defamatory character of an article.

The thoroughness of the check that a reasonable person would make before he published the article may vary with the play and interplay of these factors. The standard of care does not change, but its application may vary with the circumstances. One factor is the time element. Was the article a matter of topical or so called "hot news" requiring prompt publication to be useful—or was it an article in which time and opportunity were freely available to investigate? In the latter situation, reasonable care may in the circumstances require a more thorough investigation.

A second factor is the nature of the interests that the defendants were seeking to promote by publishing the article or articles. Informing the public as to a matter of public concern is an important interest in a democracy such as ours, but the spreading of mere gossip is of less importance. How necessary was the article to the readers in order to protect the interest involved? If there was no substantial interest to protect in publishing the article or articles to the readers of the Philadelphia [3860] Inquirer, then a reasonable person would be hesitant to publish the article unless he has a good reason to believe that it was accurate.

A third factor is the extent of the damage to the plaintiffs' reputations or the injuries to the individual plaintiff's sensibilities that would be produced if an article or articles proved to be false.

Was the article defamatory on its face? Would its defamatory connotation be known to a few persons? How extensive was the circulation of the article or articles? How easily might the plaintiffs protect their reputations by means at their own disposal?

In considering whether the defendants exercised reasonable care to ascertain whether a defamatory article was true or false, you may if you wish assess the reliability and nature of the sources relied upon by the defendants, their acceptance or rejection of various sources, their conduct in checking or failure to check upon assertions made by their sources, whether the defendants' sources were relating information such sources knew of personal knowledge or from hearsay, the motives the sources might have had in imparting information, and the [3861] nature and content of any information available to the defendants which confirmed or contradicted the defendants' sources.

* * *

[3883] Ladies and Gentlemen, before we conclude let us briefly review the eight elements of a libel action—doing it only in sentence form, each of which, remember, a plaintiff must prove by a fair preponderance of the evidence before that plaintiff may recover from a defendant or the defendants.

* * *

[3884] To prove the sixth element of the libel action, the plaintiffs must prove by a fair preponderance of the evidence that the defamatory statements contained in the article or articles were false. False defamation is the only actionable libel. False defamation. So falsity constitutes the sixth element of the libel action.

To prove the seventh of the [3885] eight elements of the libel action, the plaintiffs must prove by a fair preponderance of the evidence that the defendants were negligent in publishing the article or articles in suit—that is, that the defendants failed to exercise reasonable care to ascertain whether the articles were true or false. Remember also in your discussion and consideration of the seventh element the so-called Fair Report Privilege, and abuse of that privilege.

* * *

PRAECIPE FOR ENTRY OF JUDGMENT ON THE VERDICT

HEPPS v. PHILADELPHIA NEWSPAPERS, INC.

COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

TO THE PROTHONOTARY:

Kindly enter a judgment on the verdict, dated July 31, 1981, in favor of Defendants, in no amount, and against Plaintiffs* in the above matter, pursuant to Pa.R.C.P. 1039.

[Subscription Omitted in Printing]

*Maurice S. Hepps
General Programming, Inc.
A. David Fried (Thrifty)
Brookhaven (Thrifty)
Busy Bee (Thrifty)
Almik (Thrifty)
Lackawanna (Thrifty)
NFO (Thrifty)
Elemar (Thrifty)

Opinion

MAURICE S. HEPPS, et al.	IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA
- vs -	
PHILADELPHIA NEWSPAPERS, INC., WILLIAM ECENBARGER and WILLIAM LAMBERT	NO. 36 MAY TERM, 1976
	CIVIL ACTION—LAW

BY SUGERMAN, J.

The instant "private figure" libel action was commenced by the Plaintiffs against Philadelphia Newspapers, Inc., the publisher of the Philadelphia Inquirer ("Inquirer"), and two of its reporters, William Ecenbarger and William Lambert. We need not recite the facts underlying the action as they are set forth at length in *Hepps v. Philadelphia Newspapers, Inc.*, 3 D. & C. 3d 693 (Ches. Co. 1977), an Opinion filed by the writer in response to a pre-trial Motion for discovery.

Suffice it to note that in a series of five "investigative" articles, published by the Inquirer, the Defendant-reporters linked the individual and corporate Plaintiffs to certain named "underworld" figures and to organized crime generally.

The case was tried to a jury for a period of nearly six weeks and on July 13, 1981, the jury returned a general verdict in favor of all Defendants. The Plaintiffs filed a timely Motion for a new trial, and following argument thereon, we denied the same. The Plaintiffs thereupon appealed to the Supreme Court of Pennsylvania[1], and we write pursuant to the mandate of Pa. R.A.P. 1925(b).

Upon our receiving notice of the Plaintiffs' appeal, we directed them to serve upon us a Statement of matters complained of on appeal ("Statement"): Pa. R.A.P. 1925(a). The

1. As will be seen *infra*, we declared a statute of Pennsylvania unconstitutional. Accordingly, the Supreme Court of Pennsylvania is vested with exclusive jurisdiction of such appeals. 42 Pa. C.S.A. §722(7).

Plaintiffs have served such Statement upon us, setting forth four issues, all essentially relating to the Court's final instructions to the jury. We address the issues in turn.

1

The elements of a cause of action for defamation and the respective burdens of proof have for some years been codified in Pennsylvania and are presently found in the Judicial Code[2] at 42 Pa. C.S.A. §8343. The latter section provides the following:

"§8343. Burden of proof

(a) Burden of plaintiff.—In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

(b) Burden of defendant.—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication.

2. Act of 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978. The Judicial Code was of course in effect at the time of the instant trial.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern." (Emphasis added).

Prior to instructing the jury, at the conclusion of the trial, we declared 42 Pa. C.S.A. §8343(b)(1) which places the burden of proving the truth of a defamatory publication upon the defendant, to be unconstitutional as in violation of the First Amendment to the Constitution of the United States. More specifically, we ruled that in a libel action brought by a "private figure"[3] against a media defendant, as at bar, the First Amendment requires that the *plaintiff* bear the burden of proving the *falsity* of the defamatory publication, and we so instructed the jury (N.T. 3848). Thus, we added an element to the Plaintiffs' cause of action: proof of the falsity of the publication. Our ruling was based upon our interpretation of *Gertz v. Robert Welch, Inc., supra,* and decisions of two United States Circuit Courts of Appeal, discussed *infra*.

The Plaintiffs contend on appeal that our ruling was erroneous and base this contention upon three grounds: (a) the Supreme Court of Pennsylvania, in *Corabi v. Curtis Publishing Co.,* 441 Pa. 432, 273 A. 2d 899 (1971) (hereinafter, *"Corabi"*), *citing Restatement of Torts* §613 (1938), specifically held that the burden of proving the truth of a communication is upon a libel defendant, and this Court, as a court of inferior jurisdiction, is bound by the holding in *Corabi*; (b) quite apart from *Corabi,* 42 Pa. C.S.A. §8343(b)(1) is constitutional; and (c) *regardless* of whether the latter section of the Judicial Code is constitutional, the Defendants have waived the right to challenge the constitutionality of the statute by failing to follow the notice requirements of Pa. R.C.P. No. 235. We examine each of these grounds briefly.

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3. *See, e.g., Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (hereinafter, *"Gertz"*); *Avins v. White,* 627 F. 2d 637 (3d Cir. 1980).

(a)

As observed, the Plaintiffs contend that the issue is controlled by the decision of the Supreme Court of Pennsylvania in *Corabi,* and that as the issue before us is the same as that confronted by the Court in *Corabi,* and as we are a court of inferior jurisdiction, we are bound to follow *Corabi*. Certainly we are aware that a majority opinion of the Supreme Court of Pennsylvania is binding precedent upon the courts of Pennsylvania, *Commonwealth v. Mason,* 456 Pa. 602, 604, 322 A. 2d 357, 358 (1974), and we are not free to overrule the decisional law enunciated by that Court, *Hillbrook Apartments, Inc. v. Nyce Crete Co.,* 237 Pa. Super. 565, 573, 352 A. 2d 148, 152 (1975). *And see,* 10 *P.L.E.* Courts §81.

The Plaintiffs at the same time concede, as they must, that *all* Pennsylvania Courts, including of course the courts of common pleas, are bound to follow the decisions of the Supreme Court of the United States on all questions involving the construction and interpretation of the Constitution of the United States. *Commonwealth v. Ware,* 446 Pa. 52, 284 A. 2d 700 (1971), *cert. den.* 406 U.S. 910, 92 S. Ct. 1606, 31 L. Ed. 2d 821 (1972); *Commonwealth ex rel. Banks v. Hendrick,* 430 Pa. 575, 243 A. 2d 438 (1968).[4] With these principles in mind,

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4. Speaking to the question of the force of decisions of the United States Court of Appeals for the Third Circuit, interpreting the Constitution of the United States, our Supreme Court has said:

> "When the United States Court of Appeals for the Third Circuit has held certain practices or procedures to violate federal constitutional right[s], its decision will be accepted and followed by the courts of this Commonwealth until the United States Supreme Court has spoken on the issue. *Commonwealth v. Negri,* 419 Pa. 117, 213 A. 2d 670 (1965). See also *Commonwealth v. Bennett,* 445 Pa. 8, 282 A. 2d 276 (1971)."

Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 620 n. 5, 375 A. 2d 1285, 1288 n. 5 (1977). *And see, Commonwealth v. Whitner,* 241 Pa. Super. 316, 322 n. 9, 361 A. 2d 414, 417 n. 9 (1976):

> "On questions of constitutional proportions, considerations of comity require that decisions of the Third Circuit be treated as binding authority, unless and until the United States Supreme Court speaks to the contrary. [Citations omitted]."

it is appropriate to briefly examine *Corabi* in order to determine the nature of the issue it *did* decide.

In *Corabi*, the plaintiff, a public figure, instituted a libel action against Curtis Publishing Company, seeking damages for the publication of an article in the Saturday Evening Post alleged to be defamatory. A jury returned a verdict in favor of the plaintiff and the defendant, Curtis, thereupon filed a motion for judgment notwithstanding the verdict, on the ground, *inter alia*, that the plaintiff failed to show by clear and convincing evidence the falsity of the article in question. The lower court denied the motion and the defendant appealed, essentially asserting before the Supreme Court that permitting a public figure libel plaintiff to recover against a media defendant without a clear and convincing showing of the falsity of the publication in suit would violate the defendant's "rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States". *Id.* at 439, 273 A. 2d at 903.

The Court squarely addressed the issue and held, adversely to the defendant,

> "... counsel for Curtis claimed that, should the constitutional priviledge [under the First and Fourteenth Amendments to the Constitution of the United States] be applicable, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), and its progeny placed the burden on plaintiff to prove falsity rather than requiring defendant to prove truth. We do not agree, but such a contention does warrant that we re-examine the bases of some aspects of our law of libel in Pennsylvania in the light of the constitutional limitations placed thereon.
>
> 'It is fundamental in Anglo-Saxon jurisprudence that any man accused of wrong-doing is presumed innocent until proved guilty. This is the rule not only in our criminal courts but in the ordinary affairs of life:' *Montgomery v. Dennison*, 363 Pa. 255, n. 2, at 263, 69 A. 2d 520 (1949). Because of this

> fundamental premise, *'in actions for defamation, the general character or reputation of the plaintiff is presumed to be good:'* 53 C.J.S. Libel and Slander §210, at 317 (1948); *accord, Klumph v. Dunn*, 66 Pa. 141 (1871); *Chubb v. Gsell*, 34 Pa. 114 (1859).
>
> *As one consequence, as a general rule the falsity of defamatory words is presumed:* 53 C.J.S. Libel and Slander §217 (1948). See *Hartranft v. Hesser*, 34 Pa. 117 (1859). Nevertheless, although ordinarily in order to be actionable words must be false, falsity is *not* an element of a cause of action for libel in Pennsylvania. Rather the opposite of falsity, truth, is a complete and absolute defense to a civil action for libel: *Schnabel v. Meredeth*, supra; *Kilian v. Doubleday & Co., Inc.*, 367 Pa. 117, 79 A. 2d 657 (1951); Restatement of Torts §582 (1938). See also, *Matson v. Margiotti*, 371 Pa. 188, 88 A. 2d 892 (1952); *Montgomery v. Dennison*, supra; and the Act of April 11, 1901, P.L. 74 §2, 12 P.S. 1582. And the burden of proving the same rests upon the defendant: *Montgomery v. Dennison*, supra; *McAndrew v. Scranton Republican Pub. Co.*, 364 Pa. 504, 72 A. 2d 780 (1950); 53 C.J.S. Libel and Slander §217; Restatement of Torts §613, comment h (1938). Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth: *Montgomery v. Dennison*, supra, n. 2 at 263; 9 Wigmore, Evidence §2486, at 27 (3d ed. 1940)." *Id.* at 448-50, 273 A. 2d at 907-8. (Footnotes omitted). (Emphasis added).

As is thus readily apparent, this aspect of the decision in *Corabi* makes clear that (1) the Court was interpreting the Constitution of the *United States*, and (2) as the common law presumed a libel plaintiff's reputation to be good, and thus presumed the falsity of a defamatory publication, the burden of proving the *truth* of a defamatory publication was properly placed upon a defendant.

We consider the second of these postulations *infra*. With respect to the first, suffice it to note, in response to the Plaintiffs' contention that *Corabi* is binding upon us, that if the United States Supreme Court has ruled upon the issue, it is the pronouncement of *that* Court, and not *Corabi* that is binding upon us.

(b)

As we have observed, the Plaintiffs next contend that quite apart from *Corabi,* the placement of the burden of proving truth upon a media defendant as required by 42 Pa. C.S.A. §8343(b)(1), is constitutional within the framework of the First Amendment. We, of course, disagree and turn to an examination of the decisions that underlie our finding 42 Pa. C.S.A. §8343(b)(1) unconstitutional.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (hereinafter, *"New York Times"*), the Court held quite clearly that a public official bears the burden of proving falsity "with convincing clarity". *Id.* at 279-80, 285-86, 84 S. Ct. at 725-26, 728-29, 11 L. Ed. 2d at 706, 710.[5] *See also, Cox Broadcasting Corp. v. Cohn, supra; Garrison v. Louisiana,* 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); *Goldwater v. Ginzburg, supra.*

5. In *New York Times*, the Court held that the Constitution of the United States prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not". *Id.* at 279-80, 84 S. Ct. at 726, 11 L. Ed. 2d at 706. Such rule obviously places the burden of proving falsity upon a public official. *See,* R. Sack. *Libel, Slander and Related Problems,* III.3.2, at 135 (1980) hereinafter, "Sack"). *See also,* to the same effect, *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Goldwater v. Ginzberg,* 414 F. 2d 324 (2d Cir. 1969), *cert. den.,* 396 U.S. 1049, 90 S. Ct. 701, 24 L. Ed. 2d 695 (1970), *reh. den.* 397 U.S. 978, 90 S.Ct. 1085, 25 L. Ed. 2d 274 (1970); *Pape v. Time, Inc.,* 294 F. Supp. 1087 (N.D. Ill. 1969), *rev'd on other grounds,* 419 F. 2d 980 (7th Cir. 1969), *rev'd,* 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971).

It is therefore beyond peradventure that the burden of proving falsity is upon libel plaintiffs who are public officials or public figures,[6] and the Plaintiffs do not suggest otherwise. The Plaintiffs assert, however, that since *Corabi* was decided in 1971, *no* decision of the Supreme Court of the United States has squarely held that the First Amendment precludes the states from placing the burden of proving truth upon a media defendant in a "private" figure libel case. *Plaintiffs' Memorandum,* at 7. The Plaintiffs do concede, however, that "certain courts throughout the nation" have construed *Gertz* to so hold. *Plantiffs' Memorandum* at 8.

In *Gertz,* decided nearly three and one-half years *subsequent* to *Corabi,* the Supreme Court of the United States said:

> "We hold that, *so long as they do not impose liability without fault,* the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defmatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. *It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation."* *Id.* at 347-48, 94 S. Ct. at 3010-11, 41 L. Ed. 2d at 809-10. (Emphasis added).

Thus, in language the essence of clarity, the Supreme Court of the United States has held that the First Amendment prohibits the imposition of liability upon a media defendant without fault in a private figure libel action. *Id.* And as *Corabi* points out, "as a general rule the falsity of defamatory words is presumed . . ." *Id.* at 449, 273 A. 2d at 908. We reiterate, as we did at the time we declared 42 Pa. C.S.A. §8343(b)(1) to be

6. The holding of *New York Times* was extended to "public figure" plaintiffs in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

constitutionally infirm, that a rule, as enunciated in *Corabi* that places the burden of proving truth upon a defendant, when coupled with a presumption of falsity may result in the imposition of liability without fault—precisely the result that *Gertz* forbids. Thus it is that when a trier of fact is unable to determine the truth or falsity of an assertion in a defamatory publication, he must render his decision *against* the party having the burden of proof. In such case, application of 42 Pa. C.S.A. §8343(b)(1), and the *presumption* of falsity, permits liability without fault.

In *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F. 2d 371 (6th Cir. 1981) *cert. granted,* 454 U.S. 962, 102 S. Ct. 500, 70 L. Ed. 2d 377 (1981), *cert. dismissed pursuant to Rule* 53, 454 U.S. 1130, 102 S. Ct. 984, 71 L. Ed. 2d 119 (1982), a "private figure" libel action, the plaintiff filed suit in Tennessee against a media defendant for defamation. The Tennessee courts at the date of trial, followed the common law as set forth in *Restatement of Torts* §§518, 613(2) and placed the burden of proving truth upon a defendant, as an affirmative defense. Although falsity was an element of a cause of action for defamation, *Id.* at §§558(a), 531A., once a publication was shown to be defamatory, falsity was presumed.[7] The trial court (United States District Court For The Western District of Tennessee) in *Wilson v. Scripps-Howard, supra,* instructed the jury in accordance with the Tennessee rule and placed the burden of proving truth upon the media defendant. *Id.* at 373.

The Court of Appeals first observed that the question of whether *Gertz* requires that the burden of proving falsity be upon a private figure libel plaintiff was one of first impression for Federal appellate courts. *Id.* at 374. The Court then specifically held that "fault" as that word was used in *Gertz* consists of *two* elements: carelessness *and* falsity. *Id.* at 375. Reversing the District Court, the *Wilson* Court said:

> "This common law allocation of the burden of proof is drawn into question by the constitutional prohibition against liability without fault established

7. *Corabi,* as noted, follows this rule. *Id.* at 449, 273 A. 2d at 908.

in *Gertz,* 418 U.S. at 347-48, 94 S. Ct. at 3010-3011. The language of *New York Times v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and later cases makes clear that the burden of demonstrating the falsity of the defamatory statement rests on the plaintiff when the malice standard applies. *See, e.g., Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S. Ct. 209, 215 13 L. Ed. 2d 125 (1964) (public official must establish that the utterance was false); *Rosenblatt v. Baer,* 383 U.S. 75, 84, 86 S. Ct. 669, 675, 15 L. Ed. 2d 597 (1966) (same).

The same rule requiring the plaintiff to prove falsity is required under the First Amendment in libel cases based on negligence or some other standard of fault of lesser magnitude than malice. The Supreme Court in stating that 'demonstration that an article was true would seem to preclude finding the publisher at fault,' *Time, Inc. v. Firestone,* 424 U.S. 448, 458, 96 S. Ct. 958, 967, 47 L. Ed. 2d 154 (1976), has suggested that falsity is an element of fault in defamation cases. . . .

> The Supreme Court has said that before the status quo is changed judicially in libel cases by an award of money damages against the publisher, the First Amendment requires that the plaintiff prove fault. *Falsity is an element of fault under the First Amendment that should be proved and not presumed.* The District Court therefore erred in placing the burden on the defendant. As a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity." *Id.* at 374-76. (Emphasis added).

Addressing the reason for its holding and interpretation of *Gertz,* the *Wilson* Court said:

> "In addition, a rule that places the burden of proving truth on the defendant permits the imposi-

tion of liability without fault in certain situations. '[V]hen the trier of fact is unable to determine the truth or falsity of a proposition of fact, he must render his decision against the party having the burden of proof. Consequently, in a jury trial the judge by allocating the burden of proof decides each issue of fact which the jury is unable to decide' *E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation* 70-71 (1956). When the jury is uncertain on the issue of the truth or falsity of the statement, as it may have been in the present case, it must find in favor of the plaintiff. A presumption of falsity thus permits liability without fault in the close case, in the case in which the jury is uncertain. *See County Court of Ulster County v. Allen,* 442 U.S. 140, 99 S. Ct. 2213, 2224-30, 60 L. Ed. 2d 777 (1979), a criminal presumption case discussing the significant effect that burden-shifting presumptions may have on the outcome of a close case and requiring a close causal connection between the proved fact and the presumed fact. In libel and slander cases generally, there is no particular causal connection between the proved fact (the making of a derogatory statement) and the presumed fact (the falsity of the statement). There is no particular reason to presume falsity." *Id.* at 375-76.

While not binding upon us, the holding in *Wilson* is indeed persuasive insofar as it interprets *Gertz* and applies the latter to private figure libel actions.

In *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y. 2d 369, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299 (1981), *citing Cox Broadcasting Corp. v. Cohn, supra,* the New York Court of Appeals held that in a public figure libel case, the burden is upon the plaintiff to prove the falsity of the publication. *Id.* at 1305. Shortly thereafter, the New York Supreme Court, Appellate Division, in *Fairley v. Peekskill Star Corp.,* 445 N.Y.S. 2d 156, ____ N.E. 2d ____ (1981), *citing Rinaldi, supra,* and *Wilson v. Scripps-Howard, supra,* as authority, held in a private figure libel action that the burden of proving falsity was upon the plaintiff. *Fairley v. Peekskill,* 445 N.Y.S. 2d at 158, ____ N.E. 2d at ____.[8]

In *Jacron Sales Co., Inc. v. Sindorf,* 276 Md. 580, 350 A. 2d 688 (1976), the Maryland Court of Appeals following *Gertz,* adopted the negligence standard of fault in private figure libel actions and then said,

> "It is to be noted that under the negligence standard which we adopt here, truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon

8. Addressing the dichotomy the Plaintiffs at bar endeavor to carve in stone—public figure v. private figure plaintiffs—the *Fairley* Court said:

"The above instances of lack of defamatory meaning, however, are not the only deficiencies in the plaintiff's case. The plaintiff never demonstrated that questions of fact exist concerning the falsity of many of the statements.

We note that at common law the defamed plaintiff had no such burden. The defendant was required to prove truth as a defense (see 1 Seelman, Law of Libel and Slander in New York, par 392). More recently, however, in cases against a media defendant, the defamed plaintiff has been required to prove falsity but only after he has been found to be a public official or a public figure. In *Rinaldi v. Holt, Rinehart & Winston,* 42 N.Y. 2d 369, 380, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299, the Court of Appeals stated that '[t]his requirement follows naturally from the actual malice standard. Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish that the statement was, in fact, false.' *We see no significant distinction where the plaintiff is held to be a private figure and the topic of the article is a matter of public concern.* In such cases the plaintiff is required to prove gross irresponsibility (see *Chapadeau v. Utica Observer Dispatch,* 38 N.Y. 2d 196, 199, 379 N.Y.S. 2d 61, 341 N.E. 2d 569) resulting in a defamatory falsity. Under such circumstances, proof of falsity is again naturally related to the standard of care. Thus, in a case with constitutional implications such as the one at bar, the defamed plaintiff must prove falsity, irrespective of his status (see *Wilson v. Scripps-Howard Broadcasting Co.,* 6 Cir., 642 F. 2d 371)." *Id.* at 158. (Emphasis added).

the plaintiff, since, under this standard, he is already required to establish negligence with respect to such falsity." 350 A. 2d at 698.

The same Court, in *General Motors Corporation v. Piskor,* 277 Md. 165, 352 A. 2d 810 (1976), a private figure defamation action, expounded upon its earlier holding in *Jacron:*

> "Little need be added here to what we said in *Jacron,* since, like that case, this is one of purely private defamation. There, we read *Gertz* as being applicable to defamation actions brought by private persons without regard to whether the subject matter was one of public or general interest. In adopting the *Gertz* principles as a matter of state law, we held that they applied to cases of slander and libel alike brought against non-media defendants. Accordingly, we held that the negligence standard set forth in Restatement (Second) of Torts §580B (Tent. Draft No. 21, 1975) must be applied in cases of purely private defamation. Under this negligence standard, truth is no longer an affirmative defense; instead, the burden of proving falsity rests upon the plaintiff. Further, fault, in cases of purely private defamation, must be established by the preponderance of the evidence.
>
> In conformity with what was then controlling state law, the trial of the defamation claim in this case proceeded on the premise of liability without fault, rather than upon some greater standard such as negligence. Since the *Gertz* and *Jacron* principles are equally applicable here, we hold that a new trial is required where the plaintiff shall be required to establish the liability of the defendant through proof of falsity and negligence by the preponderance of the evidence, and may recover compensation limited to actual injury as defined in *Gertz* and *Jacron*." *Id.* at ____, 352 A. 2d at 815. (Footnotes omitted).

Against this background, the United States District Court For the District of Maryland, in *Jenoff v. Hearst Corporation,* (D.C. Md. unreported), a private figure libel action, against a media defendant instructed the jury, in accord with *Jacron,* that the burden upon the plaintiff included the requirement that the plaintiff prove that the defamatory statements were false. The jury returned a verdict for the plaintiff.

Affirming this placement of the burden, the United States Court of Appeals For The Fourth Circuit said, in *Jenoff v. Hearst Corporation,* 644 F. 2d 1004 (1981):

> "In a charge that was comprehensive, precise and correct in its definitions, and expressed throughout in simple language, the District Court instructed the jury as to the elements of defamation, the allocation of burdens of proof, and the method by which damages were to be proved and calculated. Particularly, the Court charged that to find for Jenoff they must believe that he had shown by a preponderance of the evidence that Hearst's publication of the statements was negligent, that the statements were false and defamatory, and that the statements caused Jenoff's injury. The verdict fulfilled these exactions." *Id.* at 1008.

We turn next to the decisions from Pennsylvania which were available to us at the date of our ruling. In *Steaks Unlimited, Inc. v. Deaner,* 623 F. 2d 264 (1980), a public figure libel case, the United States Court of Appeals For The Third Circuit, held, as was to be expected, that the plaintiff, as a public figure, must prove "with convincing clarity that the [media defendants] broadcast false statements knowing of their falsity or with reckless disregard of the truth". The Court then said, "There are two elements to this standard: First [the plaintiff] must prove that at least some of the material contained in the broadcast was false.[49] Second, it must prove that the defendants broadcast such material with [actual malice]" *Id.* at 274-75. In footnote 49, above, and *citing Corabi,* the Court observed, by way of dictum:

"49. *Pennsylvania's placement of the burden of proving the truth of the communication on the defendant, Corabi v. Curtis Publishing Co., 441 Pa. at 449-50, 273 A. 2d at 908-09, would appear to be contrary to the constitutional limitations on state libel law enunciated by the Supreme Court. See, e.g., Gertz, 418 U.S. at 347 n. 10, 94 S. Ct., at 3010 (rejecting Justice White's view that it would be constitutional for a state to require libel defendants to prove the truth of an allegedly defamatory statement); New York Times,* 376 U.S. at 271, 84 S. Ct. at 721 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth ... and especially one that puts the burden of proving truth on the speaker."). Inasmuch as the district court concluded that there exists a genuine issue of fact regarding the truth of some of the broadcast material, 468 F. Supp. at 783, and because the defendants have not challenged the decision on this appeal, we have no occasion to review either the correctness of the district judge's decision or the constitutionality of Pennsylvania's placement of the burden of proof." *Id.* at 274-75. (Emphasis added).

It should be again noted that *Gertz* was a "private figure" case. As such, the presumed reliance upon its holding by the Court of Appeals would appear to apply to *all* libel cases, whether commenced by public or private figure plaintiffs. Of course, we are aware that dicta in a footnote to an Opinion by the United States Court of Appeals For The Third Circuit is not binding upon us. Nevertheless, we were and remain persuaded by its logic.

We were next privy to the decision of the same Court in *Medico v. Time, Inc.,* 643 F. 2d 134 (1981) *rehearing and rehearing en banc den.* 643 F. 2d 134 (1981). In the Opinion in the latter case, authored by the same Circuit judge who wrote for the Court in *Steaks Unlimited, supra,* once again, by way of dictum, the Court said:

"Although the common law placed the burden of proving truth on the defendant, this allocation may run afoul of recently announced constitutional principles. *See* note 38 *infra.* Because we dispose of the present case on the basis of the fair report privilege, we have no occasion to resolve this constitutional issue, or to consider whether Pennsylvania courts would continue to apply the republication rule to a newspaper account of defamatory remarks, *see* Part VII & note 42 *infra.*" *Id.* at 137 n. 8.

And again:

"40. Placement on the plaintiff of the burden of demonstrating that a privileged report was not fair and accurate traditionally distinguished the fair report privilege from the truth defense, in which defendant bore the burden of proving truth, *see Corabi v. Curtis Publishing Co.,* 441 Pa. 432, 449-50, 273 A. 2d 898, 908-09 (1971). After *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), it is doubtful that a state can place the burden of proving truth on the defendant. *Gertz* held that a plaintiff in a defamation action must be required to demonstrate 'fault' on the part of defendant, *id.* at 347, 94 S. Ct. at 3010, and rejected Justice White's suggestion, offered in dissent, that a publisher may be required to prove the truth of a defamatory statement concerning a private individual, *id.* at 347 n. 10, 94 S. Ct. at 3010 n. 10. We have earlier questioned whether Pennsylvania's placement of the burden of proving truth on the defendant survives *Gertz, see Steaks Unlimited, Inc. v. Deaner,* 623 F. 2d 264, 274 n. 49 (3d Cir. 1980), and at least one member of the Pennsylvania Supreme Court has expressed similar reservations, *see Moyer v. Phillips,* 462 Pa. 395, 341 A. 2d 441, 447 (1975) (Roberts, J., concurring). *But see,* Eaton, *supra* note 33, at 1381-86, 1429 [sic: n. 34; Eaton, *The Ameri-*

can Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349 (1976)] (*Gertz* tolerates common law rule of presuming falsity of defamatory publication, and placing on defendant burden of proving truth)." *Id.* at 146 n. 40.

Thus, although the Court of Appeals For The Third Circuit has not specifically reached the issue of the placement of the burden of proving truth or falsity, the Court left little doubt as to its view on the subject.

The Supreme Court of Pennsylvania has not squarely considered the issue since its pre-*Gertz* decision in *Corabi.* However, in *Moyer v. Phillips,* 462 Pa. 395, 341 A. 2d 441 (1975) in which the Court decided that a cause of action for libel survives the death of the defendant, Justice Roberts, concurring noted that at common law, the burdens of proving truth and privilege were quite heavy and generally required testimony from a defendant in order to defend the action. Consequently, Justice Roberts wrote, the legislature could quite properly single out a cause of action for libel to abate with the death of the defendant. However, Justice Roberts, joined by Justice Nix, noted:

> "... a substantial change in the law of defamation was wrought by the decision of the United States Supreme Court in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). That case held that, as a matter of constitutional law, liability for defamation may not be imposed without some showing of fault, amounting at least to negligence, on the part of the defendant. Id. at 345, 94 S. Ct. at 3010; see Restatement (Second) of Torts §§580A, 580B (Tent. Draft No. 21, 1975). This change drastically shifts the burden of proof in defamation actions and thereby reduces the unusually heavy burden heretofore placed on defendants in such actions. In proving the necessary element of fault to make out his cause of action, the

> plaintiff will necessarily have to prove facts that would ordinarily negate the existence of a conditional privilege. Id. Topic 3, Special note, at 46-47. *Similarly, as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault; to this extent, the defendant is relieved of the burden of proving truth as a defense.* Id. §582, comment b., & §580B, comment i." *Id.* at 446-47 (Footnotes omitted) (Emphasis added).

Once again, while the concurring Opinions of two justices of the Supreme Court are not binding upon us, they are persuasive.

Finally, in *Dunlap v. Philadelphia Newspapers, Inc.,* 301 Pa. Super. 475, 448 A. 2d 6 (1982), *pet. for allowance of appeal den.* Sept. 30, 1982, 301 Pa. Super. 475, 448 A. 2d 6 (1982),[9] a case involving a libel action by a police sergeant (public official) against a newspaper, Judge Spaeth, writing for a panel of the Superior Court of Pennsylvania and, citing the concurring Opinion of Justice Roberts in *Moyer v. Phillips, supra,* and the Decision of the Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co., supra,* unequivocally placed the burden of proving falsity upon a libel plaintiff, without reference to the public figure-private figure dichotomy.[10] In doing so, Judge Spaeth wrote:

> "In our opinion *Moyer* undermines *Corabi* and its progeny, in both the Pennsylvania and federal courts. Moreover, we are persuaded that the plaintiff should have the burden of proving falsity for the reasons so carefully explained by ... the Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co. [supra]* ..." *Id.* at 488, 448 A. 2d at 13.

And as Judge Spaeth wrote in a footnote:

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9. *Dunlap* was decided more than two years *subsequent* to our ruling instantly.

10. *Cf.* Concurring Opinion by Beck, J.

"8. One commentator has cited *Moyer* as an example of a state court's express recognition of post-*Gertz* burdens of proof:

> Before 1964, truth was a 'defense' in defamation cases—which meant that falsity would be assumed unless the defendant pleaded affirmatively that his aspersion was true and then came forward at the trial with evidence of its truth. Once all the proof was in, the defendant had the burden of convincing the court that the disparagement was true. The revolution changed all this: the United States Supreme Court has, by implication, allocated an issue of falsity to the plaintiff by holding that plaintiffs have no cause of action unless they establish the defendants' fault. Public officials or public persons are required by *Times* and *Walker* to establish *Times* malice; and private persons are required by *Gertz* to establish at least negligence. These constitutional burdens requiring plaintiffs to demonstrate the defendants' fault make no sense unless the plaintiff shows that the disparagement was untrue. Statements of defamatory truth are not actionable as either libel or slander. Some state courts have expressly recognized this constitutional reallocation of the burdens on the truth issue [footnote citing *Moyer*, omitted]. *Morris on Torts* 350 (2d ed. 1980)." *Id.* at 488 n. 8, 443 A. 2d at 13 n. 8.

The Decision of the panel in *Dunlap* has twice been recently cited by the United States District Court For The Eastern District of Pennsylvania on the question of the burden of proving truth or falsity—under Pennsylvania law. While in no sense binding, and purely dictum, the Decisions should be noted.

In *Lal v. CBS, Inc.*, 551 F. Supp. 356 (E.D. Pa. 1982), Chief Judge Luongo observed in a footnote:

> "During oral argument, counsel for CBS directed the court's attention to the Pennsylvania Superior Court's recent decision in *Dunlap v. Philadelphia Newspapers, Inc.*, 448 A. 2d 6 (1982), wherein it was held that the burden of proving the truth of a publication may not constitutionally be placed upon a defendant in a defamation action. Hence, CBS argues under *Dunlap* that it is plaintiff's burden to prove that the broadcast was false. Although I predict that the Pennsylvania Supreme Court would reverse its prior decisions and follow *Dunlap* were it presented with the issue, I need not decide the point at this time. Irrespective of the placement of the burden of proof on the truth defense, an issue of fact would still remain as to whether the broadcast was true or false." *Id.* at 361 n. 3.

And in *Williams v. WCAU-TV*, 555 F. Supp. 198 (E.D. Pa. 1983), Judge Broderick agreed:

> "Capital Cities has also asserted that summary judgment should be granted it because its broadcast was substantially true. The Court is aware of the recent decision of Judge Spaeth of the Pennsylvania Superior Court in *Dunlap v. Philadelphia Newspapers, Inc.*, 448 A. 2d 6 (Pa. Super. 1982), holding that, in light of the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the plaintiff in a defamation action bears the burden of showing the falsity of the publication giving rise to the action. We join with our colleague, Chief Judge Luongo, in predicting that the Pennsylvania Supreme Court will follow *Dunlap* when it is presented with the issue. *Lal v. CBS, Inc.*, 551 F. Supp. 356 at 361 n. 3 (E.D. Pa. 1982). See *Steaks Unlimited, Inc. v. Deaner [supra]*."

Other jurisdictions as well place the burden of proving falsity upon a libel plaintiff. *See, e.g., Cianci v. New Times Publishing Co.*, 639 F. 2d 54 (2d Cir. 1980) (public figure);

Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 448 A. 2d 1317 (1982) (private figure); *McIntire v. Westinghouse Broadcasting Co.*, 479 F. Supp. 808 (Mass. 1979) (public figure); *Mihalik v. Duprey*,____Mass. App. Ct.____, 417 N.E. 2d 1238 (1981) (public figure); *Brown v. Beney*, 41 N.C. App. 636, 255 S.E. 2d 784 (1979) (private figure); *Mark v. Seattle Times*, 96 Wash. 2d 473, 635 P. 2d 1081 (1981) (private figure); *Sims v. Kiro, Inc.* 20 Wash. App. 229, 580 P. 2d 642 (1978) (private figure); *McHale v. Lake Charles American Press*,____La. App.____, 390 So. 2d 556 (1980) (public figure).

Finally, we turn to the *Restatement (Second) Torts*, adopted and promulgated on May 19, 1976, subsequent to the Decision in *Gertz*.

Section 558 sets forth the elements of a cause of action for defamation:

"§558. Elements Stated

To create liability for defamation there must be:

(a) *a false and defamatory statement concerning another;*

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." (Emphasis added).

Comment a. to Section 558 refers the reader to Section 581A with respect to the requirement of falsity. Section 581A provides:

"§581A. True Statements

One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."

Comments a. and b. to Section 581A state the following:

"Comment:

a. To create liability for defamation there must be publication of matter that is both defamatory and false. (See §558). There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him.

Several states have constitutional or statutory provisions to the effect that truth of a defamatory statement of fact is not a defense if the statement is published for 'malicious motives' or if it is not published for 'justifiable ends' or on a matter of public concern. There have been rulings that a provision of this type is unconstitutional, because it is in violation of the First Amendment requirements of freedom of speech and of the press, and its validity is very dubious. As to an action for violation of the right of privacy by giving unreasonable publicity to details of the private life of another, see §652D.

b. At common law the majority position has been that although the plaintiff must allege falsity in his complaint, the falsity of a defamatory communication is presumed. It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof. The practical effect of this rule has been eroded, however, by the recent Supreme Court holdings that the First Amendment to the Constitution requires a finding of fault on the part of the defendant regarding the truth or falsity of the communication. Pending further elucidation by the Supreme Court, the Institute does not purport to set forth with precision the extent to which the burden

of proof as to truth or falsity is now shifted to the plaintiff. See the Caveat to §613, and Comment j."

Section 613 considers the burden of proof in a defamation action. The burden upon the plaintiff includes, *inter alia*, proof of the defamatory character of the communication. *Id.* at (1) (a). The burden upon the defendant is stated as follows:

> "In an action for defamation the defendant has the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication." *Id.* at (2).

Immediately following Section 613, the Reporter, post-*Gertz*, notes this caveat:

> "The Institute expresses no opinion on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant's negligence or greater fault regarding the falsity of the communication."

Lastly, Comment f. to Section 613 provides:

> "f. *Defendant's fault regarding truth or falsity.* Under the Constitution, a plaintiff cannot recover unless the defendant acted negligently, recklessly or with knowledge with regard to the falsity and defamatory character of the communication. (See §580B). The plaintiff has the burden of proving the existence of this fault on the part of the defendant. If the plaintiff is a public official or public figure he cannot recover unless the defendant knew of the falsity of the communication or acted in reckless disregard of it. (See §580A). The plaintiff has the burden of proving this knowledge or reckless disregard. The Supreme Court expressly holds that proof in this case must be with 'convincing clarity.' Whether the same standard

> of proof is required for proof of negligence in an action by a private person has not been indicated by the Court."

In sum, as the *Restatement (Second) Torts* makes clear, there is no cause of action for defamation unless the defamatory communication is also *false*. *Corabi* agrees at 449, 273 A. 2d at 908, but reiterates the rule at common law that as the reputation of the libel plaintiff is *presumed* to be "good," the defamatory communication is *presumed* to be false. *Id.* at 449, 273 A. 2d at 908. In our view, and as *Wilson v. Scripps-Howard Broadcasting Co., supra,* points out, *Id.* at 375-76, the presumption of falsity thus created may well permit liability without fault on the part of a media defendant. *Gertz* clearly prohibits such result. We thus decided, and remain firm in that position, that the burden of proving falsity is properly placed upon a plaintiff in a libel action against a newspaper. Nor in this aspect of the subject do we discern a distinction between public figure plaintiffs and private figure plaintiffs. To draw such distinction would, we believe, effectively distort the balance the Court struck in *Gertz* designed to accommodate the competing values at stake in defamation suits by private individuals against media defendants. *Id.* at 345-49, 94 S. Ct. at 3009-12, 41 L. Ed. 2d at 808-10.

Our interpretation of *Gertz* is, as noted, shared by three United States Circuit Courts of Appeal, two panels of the Third Circuit Court of Appeals, two justices of the Supreme Court of Pennsylvania, a panel of the Superior Court of Pennsylvania[11], and a number of appellate courts in sister jurisdictions. Thus, we did not find that the Decision in *Corabi* binding upon us, and for the same reasons, found 42 Pa. C.S.A. §8343 (b) (1), placing as it does the burden of proving truth upon a media defendant, unconstitutional.

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11. A panel Opinion of the Superior Court, while it cannot overrule a Decision of the Supreme Court, *Commonwealth* v. *O'Brien*, 273 Pa. Super. 205, 417 A. 2d 236 (1979), has the force of an Opinion of the full Superior Court. *Commonwealth* v. *Roach*, ____ Pa. Super. ____, 453 A. 2d 1001 (1982).

(c)

Continuing their attack upon our ruling that 42 Pa. C.S.A. §8343(b)(1) is unconstitutional, the Plaintiffs contend that as the Defendants failed to follow the mandate of Pa. R.C.P. No. 235(a), they waived their right to assert the unconstitutionality of the statutue in question.

Rule 235(a) provides:

"Rule 235. Notice to Attorney General. Constitutionality of Statute

(a) In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice."

To properly consider the Plaintiffs' argument, we briefly recite the essential facts. Although the Defendants' counsel in his opening remarks to the jury, by alluding to the burden of proving falsity, may well have by implication alerted all parties to a constitutional challenge, it is clear that the Defendants directly called the constitutionality of the statute into question in the Defendants' "Points For Charge," submitted to the Court at the conclusion of the trial.

The Defendants' Proposed Points Nos. 10, 11 and 33, all request the Court to instruct the jury that the burden of proving that the publications were false was upon the Plaintiffs by a fair preponderance of the evidence. The Defendants' Amendments to their Proposed Points For Charge, in Points

Nos. 11 and 38, also request the same instruction. In contradistinction, the Plaintiffs' Proposed Jury Instructions (First Set) Nos. 28 and 29, ask the Court to instruct the jury that the burden of proving the truth of the publications was upon the Defendants.

As is thus obvious, if the Court had adopted the Defendants' Proposed Points it would have been required to act in violation of 42 Pa. C.S.A. §8343(b)(1). The trial judge determined that the conflicting Points submitted on the issue, in light of *Gertz*, and *Wilson v. Scripps-Howard*, sharply focused upon the question of whether 42 Pa. C.S.A. §8343(b)(1) was indeed constitutional. During the course of a "pre-charge" conference, the Court and counsel for the parties discussed the question and the application of Pa. R.C.P. No. 235(a) (N.T. 3541-51). The Court and counsel agreed that to defer a ruling upon the constitutional question until Rule 235(a) was compiled with would be prejudicial to all parties (N.T. 3551, 3589-90). The Court thereupon ruled that the statute was unconstitutional insofar as it placed the burden of proving truth upon the Defendants and instructed the jury accordingly.

In so ruling, the Court, in the face of the Defendants' failure to comply with Rule 235(a), relied upon the following language of the Rule:

> "... If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible ..."

The Court then directed the Defendants to notify the Attorney General as soon as possible (N.T. 3590). The Court's ruling and the Final Charge to the jury both occurred on July 13, 1981. *As the record reveals, the Defendants notified the Attorney General the next day, July 14, 1981, in accordance with Rule 235(a). See* Proof of Notice Under Rule 235, Exhibit B, filed of record on July 21, 1981. At this writing, more than two years later, the Attorney General has neither intervened nor responded to the Defendants' notification. Notwithstanding this unchallenged recitation of the facts as gleaned from the record, the Plaintiffs insist that the Defendants' failure to timely comply with the requirements of Rule 235(a) resulted

in a waiver of the right to challenge the constitutionality of the statute. We disagree.

Neither our research nor that of the parties has revealed a decision in Pennsylvania interpreting the specific language of the Rule applied by the Court at bar, *supra*. However, 1 *Goodrich-Amram 2d* §235.1 at 390, is instructive on the subject:

> "The normal rule is not inflexible. The court in which the action is pending has complete discretion in the administration of the proceedings, and may, in the unusual case, waive all or part of the normal rule. *In the special situation where a waiting period would be prejudicial, the court may permit the proceedings to go forward without any prior notice to the Attorney General and may direct that notice be given 'as soon as possible.'* The court, even if notice has been given, may permit the proceedings to go forward without waiting for the Attorney General to intervene or take any other action.
>
> The Rule carefully avoids any definition of the conditions under which the court may exercise its discretion to waive the normal rule. It authorizes this 'if the circumstances of the case require.' Like all other grants of discretion to a judge in the court of first instance, his actions may be subject to review if he abuses his discretion." (Footnote omitted) (Emphasis added).

We are convinced that the case before us presented that "special situation" referred to in the above-cited passage. The Plaintiffs rely upon several decisions which mandate a result contrary to that reached here. In *all* such cases, however, unlike the case before us, although the constitutionality of various statutes was challenged, frequently for the first time in appellate briefs, the Attorney General was *never* notified. Such decisions, in our view, are not apposite to the case at bar.

Of more significance to us is the discussion on the subject found in *Commonwealth v. Stein*, 487 Pa. 1, 406 A. 2d 1381 (1979), where the appellant orally challenged the constitutionality of a statute in the lower court but failed to notify

the Attorney General of the challenge. The lower court failed to address the constitutional challenge and ruled adversely to the appellant. The appellant appealed the adverse ruling to the Superior Court, raised the constitutional challenge again in his appellate brief and thereupon for the first time notified the Attorney General thereof in accordance with Pa. R.C.P. No. 235(a). The Superior Court affirmed. The appellant then appealed to the Supreme Court and again notified the Attorney General. Addressing the issue, the Supreme Court said:

> "The respondent next contends that petitioner's failure to notify the Attorney General of the Commonwealth of a constitutional challenge to an Act of Assembly in a proceeding in which the Commonwealth is not a party in violation of Pa. R.C.P. 235(a) pretermits our consideration of petitioner's constitutional claims. The rule requires 'prompt' notification of the Attorney General. Under the circumstances of this case in which the court below proceeded forthwith to the adjurdication and disposition of the case without addressing itself to the constitutional questions presented by petitioner and where the Attorney General was duly notified of petitioner's claims on appeal of the matter to the Superior Court and to this Court, and neither sought to intervene in this matter nor to raise the issue of lack of prompt notification as a reason for his decision not to intervene, we cannot accept this as a basis for refusing to consider the same." *Id.* at 7-8, 406 A, 2d at 1384. (Footnotes omitted).

In *James v. Southeastern Pennsylvania Transportation Authority*, ____ Pa. Super. ____, 459 A. 2d 338 (1983), the appellant also challenged the constitutionality of a statute in the lower court but failed to notify the Attorney General in accordance with Pa. R.C.P. No. 235(a). Again, the lower court failed to address the constitutional issue in its opinion. The appellant appealed to the Superior Court and then notified the Attorney General. Responding to the contention that the issue

was waived for the failure to comply with Rule 235(a), the Court said:

> "On appeal, the only issue raised is the constitutionality of this now-repealed statute. Notification of the constitutional challenge at this appellate level was given to the Attorney General in accordance with Pa. R.A.P. 521(a). This notification was sent on February 2, 1982 and a reply from the Attorney General's office dated March 2, 1982, states: 'If no notification is received from this Office within 30 days of the date of this letter, please assume that the Commonwealth will not be entering its appearance in these matters.' To date, more than six months after that letter, the Attorney General has not joined this case.
>
> Usually, a rule is a rule. Rule 235, supra, requires that the Attorney General be notified of a constitutional challenge to a statute at the trial court level. Normally, non-compliance with this rule would mandate our quashing of this appeal. *Irrera v. SEPTA*, 231 Pa. Super. 508, 331 A. 2d 705 (1974), involved a constitutional challenge to this same statute and also involved a failure to comply with this same rule. The 'issue was deemed abandoned or waived.' *Irrera*, supra, at 515, 331 A. 2d at 708.
>
> In the case before us, appellant did fail to comply with Rule 235; but he did raise the constitutional issue below, it was not addressed by the trial court, he did notify the Attorney General of the appellate proceedings, and the Attorney General did fail to enter the case.
>
> This same configuration of facts existed in the case of *Commonwealth v. Stein*, 487 Pa. 1, 406 A. 2d 1381 (1979). There, considering those particular circumstances, Justice Nix held that the noncompliance with Rule 235 was not 'a basis for refusing to consider the' constitutional issue. *Stein*, supra, at 8, 406 A. 2d at 1384.
>
> [1] We are willingly guided by Justice Nix's thoughts on this matter, even though they are not in this case binding precedent. Under the circumstances occurring here, the noncompliance with Rule 235 is not fatal and we will address the merits of the constitutional challenge," *Id.* at ____, 459 A. 2d at 340. (Footnotes omitted).

We find the same considerations discussed in *Stein* and *James* to guide us at this level. Clearly the purposes of Rule 235(a) have been served. The Attorney General was notified the day following our ruling on the constitutional question. Although more than two years have transpired, the Attorney General has not intervened and has given no indication that he intends to do so. As in *Stein* and *James*, we do not find late compliance with Rule 235(a) as a reason to have avoided addressing the constitutional issue.

As a corollary to the Plaintiffs' argument concerning Rule 235(a), they also contend that as the Defendants did not raise the question of the constitutionality of 42 Pa. C.S.A. §8343(b)(1), the Court should not have *sua sponte* "reached" for the issue, and to have done so constituted a violation of the clear mandate of *Wiegand v. Wiegand*, 461 Pa. 482, 337 A. 2d 256 (1975).

In *Wiegand*, the Superior Court reversed a Common Pleas Court order on the ground that the statute upon which the lower court based its decision was unconstitutional. In reversing the Superior Court and reinstating the lower court's order, the Supreme Court admonished, after observing that the parties had not raised the constitutional issue in either the lower court or in the Superior Court:

> "The Superior Court by sua sponte deciding the constitutional issue exceeded its proper appellate function of deciding controversies presented to it. The court thereby unnecessarily disturbed the processes of orderly judicial decisionmaking. Sua

> sponte consideration of issues deprives counsel of the opportunity to brief and argue the issues and the court of the benefit of counsel's advocacy. In sua sponte disposition of attacks upon the constitutionality of statutes, the attorney general is denied the opportunity of appearing and responding to the constitutional challenge. See Pa. R.Civ.P. 235(a)." *Id.* at 485, 337 A. 2d at 257.

Contrary to the Plaintiffs' contention, however, the Court at bar did not *sua sponte* reach for and decide the constitutional question. Although the Defendants did not use the language "we ask the court to declare the statute unconstitutional", they did ask the Court "not to follow it" when instructing the jury (N.T. 3545). Obviously, were the Court to have acceded to the Defendants' request without specifically declaring the statute unconstitutional, the same result would have been achieved *sub silento*. The Plaintiffs obviously agree as reference to the following colloquy between the Court and the Plaintiffs' counsel reveals:

> "The Court: They [the Defendants] are not having this court declare it unconstitutional. They are not asking that be done certainly. They are saying it should not be followed for the reason—
>
> Mr. Surkin [Plaintiffs' counsel]: They are suggesting a specific statute, which specifically governs in this case by its terms is unconstitutional. They are not saying the court is acting unconstitutionally, but *they are raising the question of constitutionality of a statute.*
>
> The only way this court can instruct a jury that the burden of proof of falsity is on the plaintiffs is to hold that that section of the statute is unconstitutional." (N.T. 3545) (Emphasis added).

Of similar significance, and as earlier noted, the Defendants' Proposed Points For Charge Nos. 10, 11 and 38, all place the burden of proving falsity on the Plaintiffs and the

Plaintiffs' Proposed Points For Charge Nos. 23 and 29, are directly contrary. The issue was clearly drawn during the precharge conference and discussed at length (N.T. 3541-52). The parties were afforded the opportunity to brief and argue the issue post-trial and did so. The Attorney General was notified. The concerns underlying the Court's decision in *Wiegand* are in no sense present here, and the Plaintiffs' reliance upon *Wiegand* is misplaced.

2

The Plaintiffs next contend that the Court's refusal to instruct the jury in accordance with the Plaintiffs' Proposed Additional Points For Charge Nos. 59 and 60, was error. Both proposed points concern the failure of the Defendants to call certain witnesses during the presentation of the defense case in chief. As the proposed points relate to several classes of witnesses, we considered them separately.

(a)

The Plaintiffs first argue that as the Defendants failed to call as a witness (1) "an editor to testify concerning the scope of editorial review given to [the allegedly defamatory articles] although [the Defendants] had an editor in the courtroom", (2) an expert to refute the Plaintiffs' damage testimony, although such an expert was also present in the courtroom, or (3) two disclosed sources, Alexander Jaffurs or Edward Hussie, the Court should have given the jury the following instruction:

> "59. In producing evidence in support of their contentions, defendants did not call any editor to testify concerning the scope of the editorial review given to these articles, they did not call any witnesses concerning plaintiffs' damage presentation, and they did not call as witnesses any sources other than Richard Doran. In particular, defendants did not call as a witness either Alexander Jaffurs or Ed-

ward Hussie. The general rule is that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so, an inference may be drawn that the evidence if produced would be unfavorable to him. The failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of that party. However, the rule is not operative unless it appears to you that the absent witness has peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him, and it must first appear that this knowledge exists before the rule can be invoked.

> Your inquiry on this point will be: (1) Is the absent witness available, or has his absence been satisfactorily explained? (2) Does the absent witness possess peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him? If the witness is available and does possess such peculiar knowledge, then the jury may infer from the fact that he was not called that if he had been produced his testimony would have been unfavorable to the party whose duty it was to call him. Laub, Trial Guide, §596."

The proposed point is, in effect, nothing more than the usual "adverse inference" or "missing witness" instruction, to be given in appropriate circumstances when a party fails to call a witness. *See Pa. SSJI* (Civ) 5.06.

The Supreme Court of Pennsylvania, in *Commonwealth v. Newmiller,* 487 Pa. 410, 409 A. 2d 834 (1979), quoted the Superior Court in *Commonwealth v. Birch,* 240 Pa. Super. 587, 361 A. 2d 737 (1976), upon the question of when a jury is permitted to draw an adverse inference:

"As the Superior Court stated:

'The criteria required before an inference can be drawn from the failure of a party to produce a witness are well-established. "'Where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him.' *Wills v. Hardcastle,* 19 Pa. Super. 525, 529 (1902); *Green V. Brooks,* 215 Pa. 492, 496, 64 A. 672 (1906); *Hass v. Kasnot,* 371 Pa. 580, 584, 535, 92 A. 2d 171 (1952). *The person not produced must be within the power of the party to produce.* II Wigmore on Evidence, §286." *Commonwealth v. Trignani,* 185 Pa. Super. 332, 340, 138 A. 2d 215, 219, *aff'd,* 393 Pa. 140, 142 A. 2d 160 (1958) (emphasis added). In *Commonwealth v. Jones,* 445 Pa. 488, 495, 317 A. 2d 233, 237 (1974) our Supreme Court articulated the "missing witness" inference rule as follows: "'[W]*hen a potential witness is available to only one of the parties* to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, *the jury may draw an inference it would have been unfavorable.* (Emphasis added.) See McCormick, Law of Evidence, 534 (1954). See also *Bentivoglio v. Ralston,* 447 Pa. 24, 288 A. 2d 745 (1972), and *Commonwealth v. Wright.* 444 Pa. 536, 282 A. 2d 323 (1971).' *Commonwealth v. Moore,* 453 Pa. 302, 305, 309 A. 2d 569, 570 (1973)." *(Emphasis in Commonwealth v. Bird.)*

'The instruction in the instant case permitted the jury to draw an inference against the appellant for the failure to call Ault to the stand. On the basis of the record before us to allow such an inference to

> be drawn was error. After a thorough review of the record, we are unable to find any evidence which establishes that Ault was "peculiarly within the knowledge and reach" *Bentivoglio v. Ralston,* 447 Pa. 24, 29, 288 A. 2d 745, 748 (1972) of the appellant such that the jury might be permitted to draw the inference that Ault's testimony would have been unfavorable to the appellant. Absent such evidence the criterion articulated in *Commonwealth v. Jones,* supra, that the potential witness must be "available to only one of the parties" has not been satisfied.' *Commonwealth v. Bird, supra,* at 591, 592, 361 A. 2d at 739. (Footnote omitted.)

Further, in *Bird,* the Commonwealth argued that no error was committed in giving the charge because the witness was equally available to both parties. As the Superior Court stated:

> '. . . to the extent Ault was "equally available" to both parties, the law is clear that no inference may be drawn against either party. See *Bentivoglio v. Ralston,* supra at 29, 288 A. 2d at 748. The evidence produced at trial simply does not establish the requisite foundation for permitting the jury to draw an inference against the appellant for the failure to call Ault as a witness,' *Commonwealth v. Bird, supra,* at 592, 361 A. 2d at 740,'" *Commonwealth v. Newmiller, supra* at 419, 409 A. 2d at 838-39.

And see, *Commonwealth v. Jones,* 455 Pa. 488, 317 A. 2d 233 (1974); *Commonwealth v. Carey,* ____ Pa. Super. ____, 459 A. 2d 389 (1983) (citing cases).

Instantly, it is clear that Messrs. Jaffurs and Hussie, as well as the Defendants' editor, seated in the courtroom and obviously known to the Plaintiffs, were not "peculiarly within the knowledge and reach" of the Defendants alone, but were, rather, equally available to the Plaintiffs, as well. Thus, the instruction was properly refused as to such witnesses.

With respect to the failure of the Defendants to produce any witnesses to refute the Plaintiffs' expert testimony concerning damages, we again find that the proposed instruction was again properly refused. The burden of proving damages was upon the Plaintiffs. 42 Pa. C.S.A. §8343(a)(6). Apparently, as a matter of trial strategy, the Defendants chose to extensively cross-examine the Plaintiffs' damage expert rather than produce an expert to refute the Plaintiffs' evidence. We are unaware of any authority and the Plaintiffs have cited none, that requires the non-burdened party to produce an expert or any other witness to refute testimony upon an issue produced by the party with the burden of proof at the risk of suffering the sting of an "adverse inference" instruction.

The ultimate sanction for the failure of a defendant to produce witnesses upon the question of damages is an adverse verdict. The Plaintiffs at bar apparently suggest that when a defendant fails to produce witnesses upon any issue upon which a plaintiff has the burden of proof, a court must instruct upon the adverse inference. Such suggestion would in effect *remove* the burden of proving damages from the plaintiff and place the burden of *refuting* damages upon the defendant. As there was no burden of proof upon the Defendants on the issue of damages, the instruction was properly refused. *See, Hertz Corp. v. Hardy,* 197 Pa. Super. 466, 473, 178 A. 2d 833, 837 (1962); *Raffaele v. Andrews,* 197 Pa. Super. 368, 370, 178 A. 2d 847, 849 (1962) (both limiting the "adverse inference" rule to non-production by the party having the burden of proof); 14 *P.L.E.* §32; *Pa. SSJI* (Civ) 5.06, Subcommittee Note.

(b)

The Plaintiffs next assert that the refusal to instruct the jury upon the Plaintiffs' Proposed Point No. 60, constituted error. During the course of their trial testimony, the Defendant reporters, Ecenbarger and Lambert, continually referred to several confidential sources and when asked, refused to reveal the identities of such sources. As a result of such refusal,

the Plaintiffs presented Proposed Point For Charge No. 60, as amended. The Proposed Point follows:

> "60. Under the law of Pennsylvania, members of the media have a statutory right, which defendants have chosen to exercise in this case, to refuse to identify certain sources of information upon which they claim their articles were based, at least in part. The obvious impact of defendants' exercise of that statutory right in this case has been that plaintiffs were unable to question those sources, to determine their reliability or lack of reliability, to learn from the sources themselves what it was that they told to defendants, and otherwise to fully cross-examine those sources and probe their credibility and that of the reporters who relied upon them. You the jury may consider both defendants' decision to exercise this statutory right, and the effect that it has had upon plaintiffs' presentation at this trial as described above, in reaching your verdict. In other words, it is for you to decide what inferences, if any, should be drawn from defendants' failure to identify certain sources. You may infer, as you deem appropriate, that the defendants were simply endeavoring to protect their sources, or you may infer that, if the sources had been identified, that would have enabled plaintiffs to develop evidence adverse to defendants concerning the truth of the information supplied, and the *existence*, reliability and credibility of the sources." (Emphasis added).

The Court refused to instruct the jury upon the Plaintiffs' Proposed Point upon the ground that to charge the jury in such fashion would effectively emasculate the so-called Shield Law of Pennsylvania.[12]

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12. Act of 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978, 42 Pa. C.S.A. §5942, substantially reenacting the Act of 1937, June 25, P.L. 2133, No. 433, §1, 28 P.S. §330.

In support of their Proposed Point, the Plaintiffs argue that as interpreted by the Supreme Court in *Taylor and Selby Appeals*, 412 Pa. 32, 193 A. 2d 181 (1963) (hereinafter, *"Taylor"*), "the scope of protection afforded by the Shield Law is determined by the reporter himself: any source which the reporter does not actually publish or publicly disclose shall remain confidential." *Plaintiffs' Memorandum* at 28. As a result, the Plaintiffs contend, there is no effective method of preventing abuse of the privilege afforded by the Shield Law unless the jury is instructed specifically that:

> "it need not accept the reporter's assertion of the Shield Law with blind faith; that it should itself examine the reporter's claim of privilege in light of all the facts in the case; and that it may, if it felt the facts so warranted, conclude that the reporter was not really trying to protect confidential sources, but rather to use the Shield Law solely or primarily to prevent plaintiffs from challenging the existence, reliability and credibility of the sources themselves, because the reporter felt that such a challenge might succeed." *Plaintiffs' Memorandum* at 29-30.

Before we explore the tensions existing between the privilege afforded news reporters by the Shield Law, on the one hand, and the "adverse inference" instruction requested by the Plaintiffs, on the other, it should be noted that the Court twice fully instructed the jury upon the tests of credibility to be applied to the testimony of each witness, including, of course, the testimony of the reporter-witnesses (N.T. 23-26, 3812-14).[13] Thus, the jury was, under these instructions, free to believe or disbelieve the reporters' testimony concerning the existence and reliability of confidential sources.

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13. Indeed, as the Defendants suggest, application of the tests of credibility, as applied to the testimony of *all* witnesses, is the "mechanism" designed to prevent abuse of the Shield Law by a reporter. *Defendants' Memorandum* at 41-42.

We begin our analysis with the observation that the privilege accorded news reporters by the Shield Law in Pennsylvania is virtually absolute, and the policy underlying this absolute privilege is well stated in *Taylor*:

> "It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.
>
> The District Attorney points out that such a construction of 'non-disclosure of source' will enable newsmen to conceal or cover up crimes. This is correct. However, we are convinced that the public welfare will be benefited more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure of the sources of newspaper information concerning a crime! Furthermore, this has been the public policy in Pennsylvania in respect to various relationships since 1887. For example, a client can confess to his attorney that he has committed a crime, but the disclosure of crime cannot be given by the attorney unless the client waives his privilege; and a person can confess to his clergyman, priest, rabbi or minister of the gospel

> that he or some named person has committed a crime, but the disclosure cannot be given unless the confessor waives his privilege.
>
> In each of these cases the Legislature has declared as a matter of public policy that information concerning the crime need not be disclosed by the lawyer or clergyman, as the case may be, even though the non-disclosure protects a criminal. The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. *The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare* than the disclosure of the alleged crime or the alleged criminal." *Id.* at 41-42. (Emphasis partly in original) (Footnotes omitted).

As is thus apparent, the Supreme Court has directed that we "liberally and broadly" construe the statutory privilege accorded newspersons to refuse to divulge the names of confidential sources—in the public interest. To instruct a jury, in the face of the Shield Law thus construed, that it might conclude that there were *no* such sources would, in our view, render the privilege a nullity.

In *Maressa v. New Jersey Monthly*,____N.J.____, 445 A. 2d 376 (1983), the New Jersey Supreme Court was called upon to decide whether that State's Shield Law,[14] permits reporters to refuse to disclose their confidential sources in libel cases, and if it does, whether a jury may be permitted to draw an adverse inference from a reporter's failure to identify confidential sources.

It should first be noted that unlike Pennsylvania's Shield Law, the New Jersey statute specifically provides that the trier

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14. N.J.S.A. §2.A:34A-21.

of fact may *not* draw any adverse inference from the exercise of the privilege not to disclose confidential sources: N.J.S.A. §2A:84A-31. Rule 39. Nevertheless, the *Maressa* Court's policy determination for holding a reporter's privilege to be absolute is instructive and, we think, apposite at bar.

The *Maressa* Court first notes that "the State has created the [defamation] cause of action and hence ... it can limit, modify or perhaps take it away through the operation of testimonial privileges, absent any claim of constitutional deprivation." *Id.* at____, 445 A 2d at 384, (*citing, Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) (applying Pennsylvania Law)).

The *Maressa* Court then elucidated its high regard for the testimonial privilege accorded reporters:

> "We have sustained testimonial privileges, even at the cost of denying a party information possibly vital to his action, 'because in the particular area concerned, they are regarded as serving a more important public interest than the need for full disclosure.' *State v. Briley,* 53 N.J. at 506, 251 A. 2d 442. In *Cashen v. Spann,* 66 N.J. 541, 556, 334 A. 2d 8 (1975), *cert. den.* 423 U.S. 829, 96 S. Ct. 48, 46 L. Ed. 2d 46 (1975), the Court 'emphasize[d] that in civil cases in which disclosure is sought ... for the purpose of asserting claims for money damages, the interests of the State in maintaining ... confidentiality ... are entitled to a greater degree of respect.' Federal courts have also noted that plaintiffs in civil actions do not have a compelling interest in obtaining confidential information. *See e.g., Baker v. F. & F. Investment,* 470 F. 2d 778, 785 (2d Cir. 1972), *cert. den.,* 411 U.S. 966, 93 S. Ct. 2147, 36 L. Ed. 2d 686 (1973); *Democratic National Committee v. McCord,* 356 F. Supp. 1394 (D.D.C. 1973)." *Id.* at____, 445 A. 2d at 385.

In sum, *Maressa* determined that the burden placed upon a libel plaintiff by the operation of a shield law must be tolerated

as the testimonial privilege served a more important public interest than the necessity of full disclosure. The same reasoning applies at bar, as is clearly noted in *Taylor, supra.*

It must also be observed that the so-called adverse inference is a principle of evidence. *Commonwealth v. Moore,* 453 Pa. 302, 309 A. 2d 569 (1973); *Steel v. Snyder,* 295 Pa. 120, 127-28, 144 A. 912, 914-15 (1929). If this evidentiary principle is permitted to operate in a libel case, in the face of the Shield Law and the broad interpretation accorded that Law in *Taylor,* we should surely be in the position of giving a reporter the protection of the Shield Law with one hand and removing it with the other. We do not subscribe to the view that *Taylor* permits such result.

Professor McCormick has also examined the question of the practical limitation on the exercise of testimonial privileges when adverse inferences are permitted to be drawn when such privileges are claimed. *McCormick on Evidence* (Cleary 2 ed. 1972) §§76, 272. McCormick first notes that the United States Supreme Court in *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), held that permitting comment upon the failure of a defendant to testify violates his Fifth Amendment privilege against self-incrimination "by making its assertion costly." *Id.* at 614, 85 S. Ct. at 1233, 14 L. Ed. at 110.

McCormick then suggests that the principle of *Griffin v. California, supra,* should be applied to testimonial privileges that are soundly based in policy. Such privileges, in McCormick's view, should be accorded the fullest protection. *Id.* at 156. The strong public policy underlying the Shield Law in Pennsylvania is clearly articulated in *Taylor. See also, Steaks Unlimited, Inc. v. Deaner, supra* at 279; *Mazzella v. Philadelphia Newspapers, Inc., supra* at 525, 528-29; *Hepps v. Philadelphia Newspapers, Inc., supra* at 714. Thus, the application of Professor McCormick's postulation, and the succinct holding in *Taylor* compels the conlcusion that the Shield Law must prevail and that the Court did not err in refusing the Plaintiffs' requested adverse inference instruction.

3

In several of the allegedly defamatory articles, the Defendant reporter William Ecenbarger reported upon a decision of the Court of Common Pleas of Lancaster County and the legal proceedings in that Court involving the Plaintiffs that led to the decision. The Plaintiffs contended at trial and in their post-trial argument that Ecenbarger's reports interpreting the proceedings and the decision were incorrect and the most damaging to the Plaintiffs of several possible interpretations. At the conclusion of the trial, the Plaintiffs requested the Court to instruct the jury in accordance with Plaintiffs' Proposed Point No. 27, as follows:

> "27. When a reporter undertakes to report to the public the results of a judicial proceeding the meaning of which might be unclear, the reporter does not have the right to choose from among several possible interpretations and publish only the interpretation most damaging to the plaintiffs. If he decides to proceed in this fashion, he must not only show that his interpretation was plausible, but also that it was correct. *If the interpretation chosen and reported by the reporter is not correct, that can constitute negligence on his part.*" (Emphasis added).

The Plaintiffs' contention is based upon a "rule" they perceive to have been enunciated by Justice Rehnquist in his plurality Opinion in *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976). Such "rule," the Plaintiffs contend, is to be applied in private figure libel cases in which a media defendant reports the outcome of a judicial proceeding. *Plaintiffs' Memorandum* at 32.

In their Memorandum, the Plaintiffs quote that part of Justice Rehnquist's Opinion they contend sets forth the "rule" upon which their Proposed Point is based:

> "Petitioner may well argue that the meaning of the trial court's decree was unclear, but this does not license it to choose from among several conceivable

> interpretations the one most damaging to respondent. Having chosen to follow this tack, petitioner must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct. We believe there is ample support for the jury's conclusion, affirmed by the Supreme Court of Florida, that this was not the case. There was, therefore, sufficient basis for imposing liability upon petitioner if the constitutional limitations we announced in *Gertz* have been satisfied." *Plaintiffs' Memorandum* at 32.[15]

The Plaintiffs argue that Ecenbarger's interpretation of the Lancaster County proceedings as reported by him and published by the Inquirer, was the most damaging of all possible interpretations and that such interpretation was incorrect. *Plaintiffs' Memorandum* at 33. Thus, the Plaintiffs assert, the jury at bar was required to decide two issues: (1) which of several possible interpretations was correct, and (2) was Ecenbarger's interpretation the most damaging to the Plaintiffs? The Plaintiffs contend that since such issues were before the jury, Proposed Point No. 27 should have been given so as to enable the jury to understand the conclusion it might reach upon resolving the foregoing factual issues.

As is easily seen, the Plaintiffs' Proposed Point requests an instruction to the effect that the choice and publication of an interpretation of an ambiguous judicial proceeding damaging to a plaintiff may, without more, constitute negligence unless the reporter proves that the interpretation chosen and reported was correct. In our view, the Proposed Point represents a serious misperception of the law.

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15. The Plaintiffs' quotation fortuitously omits the last sentence of the paragraph:

> "... These are a prohibition against imposing liability without fault ... and the requirement that compensatory awards 'be supported by competent evidence concerning the injury'." *Time, Inc. v. Firestone, supra* at 459, 96 S. Ct. at 968, 47 L. Ed. 2d at 166.

At the outset, the Proposed Point, by requiring the reporter to prove the accuracy of his interpretation or suffer a finding of negligence, in effect asserts that falsity and negligence are one in the same and places the burden of proving freedom from both upon the reporter. Thus, the Plaintiffs again request that the burden of proving truth be placed upon the libel defendant, and again, we find this constitutionally impermissible. *See, Subpart 1, supra; Gertz, supra.*

Of similar significance, our reading of *Time, Inc. v. Firestone, supra,* belies the Plaintiffs' assertion that the "rule" allegedly announced by Justice Rehnquist was indeed a rule at all or represented a holding in the case. The paragraph cited by the Plaintiffs was merely a response to a contention advanced on appeal by Time, Inc. The Supreme Court after determining that there was sufficient evidence to support a finding that Time, Inc. had selected and published an incorrect interpretation of a judicial proceeding, noted that "the prohibition against imposing liability without fault" remained to be overcome. Thus, it is clear that selecting and publishing an incorrect interpretation of a judicial proceeding that is damaging to a plaintiff is not *alone* sufficient to impose liability and is thus not sufficient to support a finding of negligence. The Plaintiffs' Proposed Point No. 27 was properly refused.

4

In their Complaint, the Plaintiffs asserted, *inter alia,* that the Defendants acted with actual malice, and coupled this assertion with a demand for punitive damages. *Plaintiffs' Complaint,* Paras. 10, 13, 15, 23, 25, 30, 35, 40, 43, 45, 50, 53, 55. At the conclusion of the Plaintiffs' case and following argument on the issue, the Court ruled that "... no reasonable jury can find actual malice on the part of the reporter defendants, and accordingly, the issue of punitive damages is withdrawn from the jury's consideration" (N.T 3310).

As their final assertion of error, the Plaintiffs contend that the issue of punitive damages should have been submitted to the jury and not withdrawn by the Court. Underlying

the Plaintiffs' argument is the further contention that the Plaintiffs produced sufficient evidence of actual malice on the part of the Defendants to permit the jury to award the Plaintiffs punitive damages. *Plaintiffs' Memorandum* at 34-46. *See Gertz, supra* at 349-50, 94 S. Ct. at 3011-12, 41 L. Ed. 2d at 810-11.

As interesting as the Plaintiffs' final issue may be, we need not and thus do not reach it, as it will be recalled that before a court may grant a new trial upon the basis of errors made at trial, it must conclude that such errors led to an incorrect result, *Warren v. Mosites Construction Co.*, 253 Pa. Super. 395, 403, 385 A. 2d 397, 401 (1978), and it is incumbent upon the moving party to "demonstrate in what way the trial error[s] caused such incorrect result," *Nebel v. Mauk*, 434 Pa. 315, 318, 253 A. 2d 249, 251 (1969). *See also Sevich v. Commonwealth*, 434 Pa. 68, 252 A. 2d 644 (1969).

At bar, the Plaintiffs have failed to demonstrate that the failure of the Court to instruct the jury upon the issue of punitive damages could have, in any respect, *properly* affected the verdict. The jury found the Defendants not liable to the Plaintiffs following a trial at which the Plaintiffs presented full and complete evidence concerning liability and damages. The only evidence prohibited as the result of the Court withdrawing the issue of punitive damages from the jury was evidence of the Defendants' net worth. *See Feld v. Merriam,* ____ Pa. Super. ____, ____, 461 A. 2d 225, 237-38 (1983) (Collects cases). Obviously, as the jury found the Defendants not liable to the Plaintiffs, the jury never reached the issue of damages. Thus, even if the Court *had* instructed the jury upon the issue of punitive damages, such instruction would have made no difference in the result. Accordingly, the failure to instruct upon punitive damages is irrelevant, and if error, was and remains error in the abstract. *Warren v. Mosites Construction Co., supra.*[16]

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16. We therefore inevitably conclude that the only purpose to be served by instructing the jury upon the subject of punitive damages would have been to prejudice the jury against the Defendants.

It should also be noted that in order to recover punitive damages, the Plaintiffs were required to prove "actual malice" on the part of the Defendants by clear and convincing evidence,[17] *New York Times Co. v. Sullivan, supra; Gertz, supra.* On the other hand, to recover compensatory or "actual" damages, the Plaintiffs, as private figures, were required to prove negligence on the part of the Defendants, merely by a preponderance of the evidence. The "clear and convincing" standard is of course more burdensome and difficult to carry than the "mere preponderance" standard. The jury, by its verdict, indicated clearly that the Plaintiffs had failed to carry their "mere preponderance" burden. Certainly, if the Plaintiffs failed to carry their lesser burden, they surely could not have overcome the burden of proving actual malice by clear and convincing evidence. There was no error.

Thus finding the Plaintiffs' contentions to be without merit, we denied their Motion for a new trial.

Filed: October 24, 1983.

By the court:

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17. This burden of proof is explicated in *Matter of Jackson,* 302 Pa. Super. 369, 374, 448 A. 2d 1087, 1089 (1982), *quoting in part In re Jackson,* 267 Pa. Super. 428, 431, 406 A. 2d 1116, 1118, which, in turn, *quotes LaRocca Trust,* 411 Pa. 633, 640, 192 A. 2d 409, 413 (1963).

Opinion

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

MAURICE S. HEPPS, et al. v. PHILADELPHIA NEWSPAPERS, INC., WILLIAM ECENBARGER, and WILLIAM LAMBERT Appeal of MAURICE S. HEPPS, et al.	No. 18 E.D. Appeal Dkt. 1983 Appeal from the Order of the Court of Common Pleas of Chester County dated February 15, 1983, entered at No. 36 May Term, 1976 ARGUED: April 9, 1984

NIX, C. J. FILED: DECEMBER 14, 1984

The instant civil libel action resulted from a series of five "investigative" articles appearing in *The Philadelphia Inquirer* which purported to link Maurice S. Hepps, General Programming, Inc. and a number of independent corporate entities who operated beer and beverage distributorships as franchises of General Programming, Inc. to certain named "underworld" figures and to organized crime generally. Maurice Hepps, the individual plaintiff-appellant was the principal stockholder of the corporate plaintiff-appellant, General Programming, Inc. ("General"). General owns the trademarks "Thrifty Beverage" and "Brewer's Outlet," and licenses such marks and provides management and consultation services to licensees. The remaining corporate and individual plaintiff-appellants, approximately nineteen in number, are licensees of General. As a result of these articles, the plaintiff-appellants instituted a civil action in libel against Philadelphia Newspapers, Inc., the publisher of the newspaper in question, and William Ecenbarger and William Lambert, the reporters who prepared the series of articles.

After a six-week trial, the jury returned a general verdict

in favor of defendant-appellees. Plaintiff-appellants based their challenge to the judgment rendered below upon the trial court's decision to instruct the jury that the plaintiff bears the burden of proving the falsity of the defamatory publication. This instruction was given after the trial court had ruled that 42 Pa. C.D. §8343(b)(1) was unconstitutional in that it requires the defendant in a civil libel suit to establish the truth of the defamatory publication by way of an absolute defense to the action. Plaintiff-appellants also appeal the trial court's dismissal of their claim for punitive damages. This direct appeal seeking the award of a new trial is entertained by this Court pursuant to 42 Pa. C.S. §722(7)

I.

It has long been the decisional law of this Commonwealth that truth is a complete defense to a civil action for libel, and that the burden of proving truth rests upon the defendant. *Matson v. Margiotti,* 371 Pa. 188, 88 A.2d 892 (1952); *Kilian v. Doubleday & Co., Inc.,* 367 Pa. 117, 79 A.2d 657 (1951); *Montgomery v. Dennison,* 363 Pa. 255, 69 A.2d 520 (1949); *Mulderig v. Wilkes Barre Times,* 215 Pa. 470, 64 A. 636 (1906); *Burkhart v. North American Co.,* 214 Pa. 39, 63 A. 410 (1906); *Bryant v. Pittsburgh Times,* 192 Pa. 585, 44 A. 251 (1899); *Wood v. Boyle,* 177 Pa. 620, 35 A. 853 (1896); *Collins v. Dispatch Pub. Co.,* 152 Pa. 187, 25 A. 543 (1893); *Conroy v. Pittsburgh Times,* 139 Pa. 334, 21 A. 154 (1891); *McLenahan v. Andrews,* 135 Pa. 383, 19 A. 1039 (1890); *Press Co. v. Stewart,* 119 Pa. 584, 14 A. 51 (1888); *Rowan v. DeCamp,* 96 Pa. 493 (1880); *Barr v. Moore,* 87 Pa. 385 (1878); *Burford v. Wible,* 32 Pa. 95 (1858); *Crapman v. Calder,* 14 Pa. 365 (1850); *Steinman v. McWilliams,* 6 Pa. 170 (1847). In 1953, this common law principle was codified in the Act of August 21, 1953, P.L. 1291, No. 363, §1(2)(a), 12 P.S. §1584a(b)(1) (Repealed 1978), which provided:

> In an action for defamation, the defendant has the burden of proving, when the issue is properly raised;

> The truth of the defamatory communication.

The provision was reenacted in the Judicial Code on July 19, 1976, effective June 27, 1978, 42 Pa. C.S. §8343(b)(1):

> Burden of defendant. —In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:
>
> The truth of the defamatory communication.

* * *

Thus the section now being challenged is the codification of the decisional law as it has developed over the last century in this Commonwealth on this subject. We are now called upon to determine whether section 8343(b)(1), which places upon the defendant in a libel suit the burden of proving the truth of defamatory statements, is constitutionally infirm in view of the relatively recent interpretations of the First Amendment of the United States Constitution as expressed by the United States Supreme Court in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and its progeny. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.,* ____ U.S. ____, 80 L.Ed. 2d 502 (1984); *Wolston v. Reader's Digest Ass'n., Inc.,* 443 U.S. 157 (1979); *Hutchinson v. Proxmire,* 443 U.S. 111 (1979); *Herbert v. Lando,* 441 U.S. 153 (1979); *Time, Inc. v. Firestone,* 424 U.S. 448 (1976); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971); *Time, Inc. v. Pape,* 401 U.S. 279 (1971); *Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1971); *Greenbelt Cooperative Publishing Ass'n. v. Bresler,* 398 U.S. 6 (1970); *St. Amant v. Thompson* 390 U.S. 727 (1968); *Time, Inc. v. Hill,* 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967).

A.

Before examining the United States Supreme Court decisions relating to the impact of the First Amendment upon this

area of the law, it is instructive to briefly review the Pennsylvania law of libel as it has developed over the years. The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle transcended the criminal law and was equally applicable to the ordinary affairs of life. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 448-49, 273 A.2d 899, 907 (1971). *Montgomery v. Dennison, supra* at 263 n.2, 60 A.2d at 525 n.2. Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good. *Corabi, supra* at 449, 273 A.2d at 908; *Klumph v. Dunn,* 66 Pa. 141, 147 (1870); *Hartranft v. Hesser,* 34 Pa. 117, 119 (1859); *Chubb v. Gsell,* 34 Pa. 114, 116 (1859). Since the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was a presumption of the falsity of the defamatory words. *Corabi, supra; Hartranft v. Hesser, supra.*

Evidentiary considerations have also been offered to justify the presumption. As noted by this Court in *Corabi:*

> Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth: *Montgomery v. Dennison,* supra n.2 at 263; 9 Wigmore, Evidence §2486, at 276 (3d ed. 1940). Although not invariably so, it is preferable to place the burden of proof upon the party having in form the affirmative allegation and/or upon the party who presumably has peculiar means of knowledge of the particular fact in issue: See Wigmore, Evidence §2486, supra. For example, in the context of libel, if the written communication accuses plaintiff of being a murderess, a burglar or a prostitute, the defendant knows precisely what particular event he is referring to and the source of his information, whereas the plaintiff, not knowing these facts, would experience great difficulty in refuting these general charges by showing their falsity.
>
> *Id.* at 450-451, 273 A.2d at 908-09 (footnotes omitted).

Particularly, where the accusation is totally general and without the specificity necessary for a response, the absence of such a presumption would force the plaintiff in the unenviable position of proving the negative. *Corabi, supra* at 450, 273 A. 2d at 907; *Conroy v. Pittsburgh Times, supra* at 339, 21 A. at 156.[1]

Although falsity of the defamatory words is presumed, proof of the truth of the words by the defendant is a complete and absolute defense to a civil action for libel. *Pierce v. Cities Communications, Inc.*, 576 F.2d 495, 507 *cert. denied,* 439 U.S. 861 (1978); *Lowenschuss v. West Publishing Co.*, 542 F.2d 180, 184 (3d Cir. 1976); *Keddie v. Pennsylvania State University,* 412 F. Supp. 1264 (M.D. Pa. 1976); *Fram v. Yellow Cab Co. of Pittsburgh,* 380 F. Supp. 1314 (W.D. Pa. 1974); *Corabi, supra* at 449, 273 A.2d at 907; *Schonek v. WJAC Inc.*, 436 Pa. 78, 84, 258 A.2d 504, 507 (1969); *Schnabel v. Meredith,* 378 Pa. 609, 612, 107 A.2d 860, 862 (1954); *Montgom-*

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1. Another rationale offered to support the presumption of the good character or innocence of the plaintiff was the view that it would be unduly prejudicial to the defendant to permit the plaintiff to prove his general good character in the plaintiff's case-in-chief. In Hartranft v. Hesser, 34 Pa. 117, 119 (1859), it was stated that the plaintiff is not permitted to prove his general good character because to permit such evidence would be to take advantage of the defendant who was unapprised of its nature or to raise a collateral issue not made by the pleadings in the case. *Id.* Thus, character evidence in defamation cases follows the general rule that "In civil proceedings, evidence of character is inadmissible unless directly in issue or involved in the nature of the proceedings, and *even then evidence of good character is not admissible unless and until it is attacked by evidence to the contrary, it being presumed to be good in absence of proof that it is bad.* 1 G. Henry, Pennsylvania Evidence § 152 (1953) (emphasis added) *citing* Costello v. Long, 62 Pa. Super. 13, 17 (1915); Burkhart v. North American Co., 214 Pa. 39, 42, 63 A.410, 411 (1906); Clark v. North American Co., 203 Pa. 346 353, 53 A. 237, 239 (1902); Chubb v. Gsell, 34 Pa. 114, 116 (1859). *See also* 22 P.L.E. *Libel and Slander* § 57 (1959).

ery v. Dennison, supra at 264, 69 A.2d at 525; *Hartranft v. Hesser, supra* at 119; *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 485-86, 448 A.2d 6, 11 (1982); *Badami v. Dimson*, 226 Pa. Super. 75, 77, 310 A.2d 298, 300 (1973); Restatement (Second) of Torts § 581A, comment b, at 235-36 (1976). Under our law, since truth is an absolute defense, whether the defamatory statements were made willfully or negligently, Restatement (First) of Torts § 582 comment (a) (1938), a civil action in libel is only actionable, at least in theory, where the defamatory statement is also false.[2] *Rosenbloom, supra* at 37; *Harbridge v. Greyhound Lines, Inc.*, 294 F. Supp. 1059, 1063 (E.D. Pa. 1969); *Corabi, supra* at 448-49, 273 A.2d at 908; *Young v. Geiske*, 209 Pa. 515, 519, 58 A. 887, 888 (1904); *Wood v. Boyle, supra* at 631, 35 A. at 854; *Collins v. Dispatch Pub. Co., supra* at 189-90, 25 A. at 547; *Barr v. Moore, supra* at 391; Restatement (First) of Torts § 558 (1938). The cause of action arises not only because the words injure the reputation of another, but also because the publication is false. The defamatory nature of the comment, regardless of how injurious to the reputation, is not alone actionable. *Rosenbloom, supra* at 37; *Harbridge v. Greyhound Lines, Inc.*, 294 F. Supp. 1059, 1063 (E.D. Pa. 1969); *Corabi, supra* at 448-49, 273 A.2d at 908; *Young v. Geishe, supra* at 519, 58 A. at 888; *Wood v. Boyle, supra* at 631, 35 A. at 853; *Collins v. Dispatch Pub. Co., supra* at 189-90, 25 A. at 547; *Barr v. Moore, supra* at 391.

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2. In *Corabi* it is stated that falsity is not an element of the civil action of libel under our law. *Id.* at 449, 273 A.2d at 908. This statement is troubling. The fact that an element is presumed and can only be overcome by affirmative evidence establishing the contrary, does not remove it as an element of the cause of action. If such was the case, there would be no need for the presumption in the first instance. *See* Waugh v. Commonwealth, 394 Pa. 166, 146 A.2d 297 (1959); Waters v. New Amsterdam Casualty Co., 393 Pa. 247, 144 A.2d 354 (1958); MacDonald v. Pennsylvania R. Co., 348 Pa. 558, 36 A.2d 492 (1944); Smith v. Kingsley, 331 Pa. 10, 200 A.11 (1938); Watkins v. Prudential Ins. Co. of America, 315 Pa. 497, 173 A. 644 (1934). A more accurate statement of our law is that, although falsity is an element of the cause of action, we have concluded that the burden should be placed upon the alleged defamer to establish the truth of these accusations and will presume it in the absence of proof to the contrary.

Even though false, published materials may not give rise to liability where it is privileged. The publisher of the defamatory falsehood under the traditional Pennsylvania law of defamation is not a guarantor of the truth of the materials published. However, privilege is abused if the defamatory statement is negligently published. In *Montgomery v. Philadelphia*, 392 Pa. 178, 140 A. 2d 100 (1958), it was stated that the defense of privilege in cases of defamation "rests upon the . . . idea, that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." 392 Pa. at 181, 140 A.2d at 102, *quoting* W. Prosser, *Torts* § 607 (2d ed. 1955). Thus, truth was never the *only* defense to a civil libel action in Pennsylvania. This concept was clearly set out in *Diamond v. Krasnow*, 136 Pa. Super. 68, 7 A.2d 65 (1939), which stated that the immunity of a privileged communication "is an exception to the general rule that nothing short of the truth is a defense . . ." *Id.* at 76, 7 A.2d at 69, *citing Stevenson v. Morris*, 288 Pa. 405, 136 A. 234 (1927); *Hartman v. Hyman*, 287 Pa. 78, 134 A. 486 (1926); *Montgomery v. New Era Printing Co.*, 229 Pa. 165, 78 A. 85 (1910); *Mulderig v. Wilkes-Barre Times, supra McGaw v. Hamilton*, 184 Pa. 108, 39 A. 4 (1898); *Conroy v. Pittsburgh Times, supra; Russell v. Pa. Mut. Life Ins. Co.*, 118 Pa. Super. 351, 179 A. 798 (1935); *McGerary v. Leader Publish. Co.*, 52 Pa. Super. 35 (1912); *Collins v. News Co.*, 6 Pa. Super 330 (1898).

Nonetheless, tradition, evidentiary considerations, or any other state determined policy, cannot support the presumption of falsity, if it is offensive to constitutional mandate. Judge Sugerman reviewed the pertinent United States Supreme Court decisions and concluded that we are compelled to reject the rule that the defendant bears the burden of proving truth. We are unquestionably bound by the United States Supreme Court's interpretation of the provisions of the Federal Constitution. *First Pennsylvania Bank v. Lancaster County Tax Claim Bd.*, ____ Pa.____, ____ 470 A.2d 938, 941

(1983); *Commonwealth v. Ware,* 446 Pa. 52, 56, 284 A.2d 700, 702 (1971), *cert. denied,* 406 U.S. 910 (1972); *Commonwealth ex rel. Banks v. Hendricks,* 430 Pa. 575, 578, 243 A.2d 438, 439 (1968); *Commonwealth v. Robin,* 421 Pa. 70, 72, 218 A.2d 546, 546 (1966); *Carolene Products Co. v. Harter,* 329 Pa. 49, 55, 197 A. 627, 630 (1938). We will therefore review those decisions and assess Judge Sugerman's conclusions as to their impact under the facts of this case.

B.

At the outset of the discussion of the United States Supreme Court decisions, it must be remembered that the Court was attempting to define the extent of the freedom of expression provided under the First Amendment, and made applicable to the state through the Fourteenth Amendment, as it relates to civil actions for libel under state law. A subsidiary objective was the formulation of a rule that would satisfy the protection found to be constitutionally required. In the words of that Court, they were struggling "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz, supra* at 325. Our purpose for reviewing these decisions at this time is to determine whether our rule of state libel law presuming the good reputation of the plaintiffs and setting up truth as a defense to be established by the defendant runs counter to the present interpretations of the First Amendment mandates.

In *New York Times, supra,* the Supreme Court stated that state law of civil libel "can claim no talismanic immunity from constitutional limitations." *Id.* at 269. That Court then proceeded to conclude that the central meaning of the First Amendment, enforced upon the states through the Fourteenth Amendment, required a privilege of fair comment and honest mistake of fact. The majority held that a public official is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with

knowledge that it was false or with reckless disregard of whether it was false or not."[3] *Id.* at 279-80.

In the context of criticism of public officials the Court rejected the argument that the availability of the defense of truth, where the burden of establishing it is on the defendant, satisfies the constitutional concerns involved.

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." (citations omitted) The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.
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> *Id.* at 279 (citations omitted).

Although *New York Times* made it clear that no longer would the former view that libel was speech not protected by the First Amendment be without exception, many questions were still left unanswered by that decision as to the full extent of the constitutional privilege developed therein. The *New York Times* decision did not expressly state that the constitutional protection required the shifting of the burden of proving falsity to the plaintiff in establishing a *prima facie* case. Nor did the reasoning of that decision necessarily implicitly compel such a result. *See Corabi, supra* at 468 n.22, 273 A.2d at 917 n.22. In *New York Times,* the Court had no occasion to consider the question of who should bear the burden of proving falsity when it is in fact in issue in the litigation. To the contrary, the Court in *New York Times* was concerned with

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3. The *New York Times* decision was without dissent. The three concurring justices would have required an absolute, unconditional privilege to critique official conduct. New York Times v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J. concurring, joined by Douglas, J.); *Id.* at 304-05 (Goldberg, J., concurring, joined by Douglas, J.).

stressing "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive." *Id.* at 271-72.[4]

The major question commanding the attention of the Court in subsequent decisions was the extent to which the *New York Times* rule should apply. In 1967, the Court extended the *New York Times* rule to public figures in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker,* 338 U.S. 130 (1967). In those cases the plaintiffs were not public officials as was the case in *New York Times,* but rather individuals who had attracted public attention either through the positions they held in society or their activities in affairs of

4. We note that several of the decisions of that Court have stated the *New York Times* holding as requiring proof of falsity as part of the plaintiff's *prima facie* case. For instance in Garrison v. Louisiana, 379 U.S. 64 (1964), Justice Brennan stated:

> We held in New York Times that a public official might be allowed the civil remedy *only if* he establishes that the utterance was false
>
> . . .
>
> *Id.* at 74. (emphasis added)

See also Greenbelt Corp. Publishing Assn. v. Bresler, 398 U.S. 6, 8 (1970); Rosenblatt v. Baer, 389 U.S. 75, 84 (1966).

However, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), Justice White speaking for the Court again stated that "the prevailing view is that truth is a defense." *Id.* at 489. Thus as to whether the communications intended to be covered by the *Times* rule, required proof of falsity as part of the plaintiff's *prima facie* case under the *New York Times* decision is at best unclear and debatable. Moreover, the subsequent restatement of the *Times* holding in the cited cases can arguably be classified as loose characterizations and thus not determinative of the question as to where the burden of proving falsity should lie. *See* Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond, 61 Va. L. Rev. 1349, 1383-84 (1975).

public concern.[5] However, in *Rosenbloom, supra,* the Court was divided on whether the standard of knowing or reckless falsity applied where the alleged defamatory statements related to a private individual in a matter of public or general concern.[6]

Instant appellee concedes that up to this point the constitutional protection identified in *New York Times* had not been extended to the private citizen seeking redress for an alleged libel under state law. Thus the state could, without reference to the Constitution, assign the burden to prove truth upon the defendant in a private figure libel case. Brief of Appellees at 13. We agree with this concession and add, as previously noted, even if the constitutional protection had been found applicable, it was still unclear up to that point whether placing the burden of proving truth upon the defen-

5. At this stage of the development of the term a "public figure" is one who through fame, notoriety of achievements, or through voluntary participation in resolution of important public questions, seeks to influence society. Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976); Gertz v. Robert Welch, Inc. 418 U.S. 323, 337, 342 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 154, 164 (1967); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 273 (3d Cir. 1980). The characteristics of this category deemed to justify the application of the actual malice standard are that the public figure invites public attention, criticism and comment and usually has access to the media to refute any defamatory publicity. *Time, Inc., supra* at 456; *Gertz, supra* at 344; *Steaks Unlimited, supra* at 274.

6. To be distinguished from those included within the "public figure" category is the involuntary public figure. This is an individual who has not attained fame or notoriety and who is thrust into an event of general public interests involuntarily. Times, Inc. v. Firestone, 424 U.S. 448 (1976). Justice Brennan in Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971) argued that the "malice standard" should not focus on the nature of the individual involved but rather upon whether the event is one of general public interests. *See also Gertz, supra* at 361 (Brennan, J., dissenting). The *Firestone* Court specifically rejected the Brennan view stating that such an extension would unjustifiably abridge a legitimate state interest in protecting private individuals from libelous publications. *Id.* at 454. Our decision in Matus v. Triangle Publications, Inc., 445 Pa. 384, 286 A. 2d 357 (1971), *cert. denied,* 409 U.S. 856 (1972), which adopted the position of the *Rosenbloom* plurality, must therefore be overruled.

dant would have been offensive to such a Constitutional mandate. Nevertheless, appellee relies, as did Judge Sugerman, upon the Court decision in *Gertz* as the basis for the view that the First Amendment is here applicable and that placing the burden upon the defendant to prove truth runs afoul of the protection afforded free expression.

In approaching the issue in *Gertz* that the Court was unable to resolve in *Rosenbloom*, they began by recognizing that the difference between the public official and public figure on the one side and the private individual on the other warranted a different approach in the two situations. The Court expressed the belief that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[7] *Gertz, supra* at 345. After acknowledging the persisting antithesis that must necessarily exist between freedom of speech and press and libel actions,[8] the Court nevertheless concluded that "the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."[9] Acknowledging the legitimacy of the concern of the *New York Times* Court to assure the freedoms of speech and press that "breathing space" essential to their fruitful exercise, *see NAACP v. Button*, 371 U.S. 415

7. The United States Supreme Court has interpreted the First Amendment as affording private individuals a greater protection from defamation than both public officials and public figures because public figures and officials enjoy a greater opportunity to reply to libelous statements and they have also purposefully assumed a position in society which invites attention and comment. By voluntarily assuming such a role in society, public figures and officials relinquish, to a degree, their right to privacy. *Gertz, supra* at 345.

8. The Court noted that since libel is based upon the content of the speech, it limits the freedom of the publisher to express certain sentiments unless the publisher is willing to take the risk of the defense of a civil action in libel. *Gretz, supra* at 342.

9. In this context, the Court noted that the extension of the *New York Times* test proposed by the *Rosenbloom* plurality would "abridge this state interest [protecting private citizens from injury resulting from defamatory falsehood] to a degree that we find unacceptable". *Gertz, supra* at 346.

(1963), the *Gertz* Court held that "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to the private individual" provided the state did not create a scheme that imposed liability without fault. *Gertz, supra* at 347.[10]

In reaching this conclusion, the *Gertz* Court stated that it believed its rule would insulate the private citizen from the stringent standard of actual malice, and yet shield the media from the rigors of strict liability.[11] The Court stated that it had chosen this approach "in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation." *Id.* at 348.

However, the Court found that this compelling state interest did not extend beyond compensation for actual injury.

> [W]e hold that the states may not permit recovery of presumed or punitive damages, at least when lia-

10. The *Gertz* Court characterized a rule of strict liability as one which compels a publisher or broadcaster to guarantee the accuracy of his factual assertions. *Gertz, supra* at 340. The Court stated that "[a]llowing the media to avoid liability *only* by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id.* (emphasis added).

11. As a caveat to this aspect of the *Gertz* standard, the Court cautioned:

> *. . . At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent."* This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc. v. Hill*, 385 US 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.
>
> *Id.* at 348 (emphasis added; footnote omitted).

Since, however, the defamatory character of the articles in question in this appeal was apparent, the above caveat of *Gertz* is not here applicable.

> bility is not based on a showing of knowledge of falsity or reckless disregard for the truth.
>
> *Id.* at 349.

The Court was of the view that the "largely uncontrolled discretion" conferred on juries in presumed damages and the invitation in these instances to juries "to punish unpopular opinion" did offend constitutionally protected free expression. Concluding that presumed damages constituted "gratuitous awards of money damages far in excess of any actual injury," *id* at 349, the Court reasoned that the state interest in these instances was insufficient to permit recovery unless, at a minimum, at least, the *New York Times* standard is met. Following the same general reasoning as emloyed in the case of presumed damages, the Court reached the same result for punitive damages.

II.

A.

It is apparent from *Gertz* and the cases following it, *Herbert v. Lando, supra; Time, Inc. v. Firestone, supra;* that the only restraint upon the states mandated by the First Amendment in civil actions for defamatory falsehood brought by a private figure for compensatory damages is that they may not impose liability upon the defendant without fault. As early as 1939 this Court stated, in *Summit Hotel Co. v. National Broadcasting Co.,* 336 Pa. 182, 8 A. 2d 302 (1939), that liability for defamatory falsehood cannot be imposed without fault. The defendant in that case was a broadcasting company that rented its time and facilities to an advertising corporation for the transmission of a series of sponsored radio programs over one of its networks. A script for each program was prepared in advance and submitted to the broadcaster and followed exactly by the performers at rehearsals where it was approved. All participants in the program in question were employed and paid by the advertising company which had rented the time slot. When the program was over one-half

completed, one of the participants interpolated an extemporaneous remark.

The trial court found that the interjected "ad lib" was "slanderous per se" and ruled that the defendant's liability was absolute though it was without any fault. In rejecting the trial court's acceptance of a theory of strict liability, Chief Justice Kephart noted:

> In Pennsylvania, the principle of liability without fault for injuries to the person has received scant consideration. The great body of our law of liability for personal injuries is that of liability through fault; liability based almost exclusively on wrongful conduct.
>
> *Id.* at 187, 8 A. 2d at 304.

In discussing other areas where some states had imposed strict liability, reference was made to those jurisdictions that were then extending a theory of strict liability to publishers of newspapers for defamatory publications, the Court stated:

> Considering the rule of supposedly absolute liability imposed in some jurisdictions on the publisher of a newspaper for his defamatory publications, and this is the rule here chiefly relied on, a close examination of the Pennsylvania law will show that our rule is not one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter. (Citations and footnote omitted)
>
> *Id.* at 192, 8 A. 2d at 307.

Thus, it would appear that long before the First Amendment considerations were raised, the common law of this jurisdiction had determined that the law of libel should require negligence or willful misconduct. *See Rosenbloom v. Metromedia, Inc., supra* at 87 n.13; *Zerpol Corp. v. DMP Corp.,* 561 F. Supp. 404, 410 n.3 (E.D. Pa. 1983); *Purcell v. Westinghouse Broadcasting Co.,* 411 Pa. 167, 178-81, 191 A.2d 662, 668-69 (1963); *Williams v. Kroger Grocery & Baking Co.,* 337 Pa. 17,

19, 10 A.2d 8, 9 (1940); *Wharen v. Dershuck,* 264 Pa. 562, 566, 108 A. 18, 19-20 (1919); *Clark v. North American Co.;* 203 Pa. 346, 352, 53 A. 237, 239 (1902); *Neeb v. Hope,* 111 Pa. 145, 151-52, 2 A. 568, 570-71 (1885).[12]

We are mindful that the former conditional privileges recognized under our law have lost their significance in the wake of *New York Times* and *Gertz*. If a private figure plaintiff is to maintain any cause of action at all, he must minimally establish the negligence on the part of the publisher. In so doing, "he has by that very action proved any possible conditional privilege was abused." Restatement (Second) of Torts, Topic 3, Title A, Special Note, at 259 (1977); *see also Nevada Independent Broadcasting Corp. v. Allen,* ____ Nev. ____, 664 P.2d 337, 342-343 (1983).

B.

The core of the reasoning of both the trial court and instant appellees is that the *Gertz* prohibition against strict liability necessarily requires that the plaintiff must have the burden of proving the falsity of the matter. This proposition does not logically flow, nor is it consistant with the concern sought to be addressed by the *Gertz* rule. The concept of fault as developed in the *Gertz* decision is not synonymous with the burden of proof of truth or falsity. The *Gertz* Court wished to avoid the possibility that a publisher may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its

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12. Moreover, the requirement of fault has been codified in Pennsylvania law since 1901. 42 Pa. C.S. §8344 (originally enacted in Act of April 11, 1901, P.L. 74, §3, 12 P.S. §1583) provides:

> Malice or negligence necessary to support award of damages
>
> In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.

dissemination. *Id.* at 346. Under the law of this Commonwealth there is no liability for civil libel unless plaintiff can at least establish that the dissemination occurred as a result of lack of due care. 42 Pa. C.S. §8344; *Rosenbloom, supra* at 87 n.13; *Zerpol Corp. v. DMP Corp., supra* at 410 n.3; *Purcell* v. *Westinghouse Broadcasting Co., supra* at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co., supra* at 19, 10 A.2d at 9; *Wharen v. Dershuck, supra* at 566, 108 A. at 19-20; *Clark v. North American Co., supra* at 352, 53 A. at 239. A plaintiff, even though benefitting from the presumption of falsity, must nevertheless show that defendant acted maliciously or negligently. 42 Pa. C.S. §8344; *Rosenbloom, supra* at 87 n.13; *Zerpol Corp. v. DMP Corp., supra* at 410 n.3; *Purcell v. Westinghouse Broadcasting Co., supra* at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co., supra* at 19, 10 A.2d at 9; *Wharen v. Dershuck, supra* at 566, 108 A. at 19-20; *Clark v. North American Co., supra* at 352, 53 A. at 239. Restated, under our law the inability of the publisher to overcome the presumption of falsity of the defamatory statement will not insure recovery by the plaintiff. The recovery is dependent upon plaintiff's ability to establish malice or negligence on the part of the publisher in disseminating

the defamatory falsehood.[13] *See* 42 Pa. C.S. §8343(a)(7); *Corabi, supra* at 452 n.10, 453, 273 A.2d at 899, n.10; *Sciandra v. Lynett, supra* at 601, 187 A.2d at 589; *McAndrew v. Scranton Republican Pub. Co., supra* at 515, 72 A.2d at 785; *Montgomery v. Dennison, supra* at 262-64, 69 A.2d at 524-25.

We are satisfied that Pennsylvania law makes a constitutionally acceptable accommodation between the freedom of expression required by the First Amendment and our law of civil libel for compensatory damages brought by a private individual to redress defamatory falsehood. Strict liability is a policy determination that injury flowing from a set of circumstances will be compensable regardless of the blamelessness of the conduct of the defendant. The prohibition of *Gertz* restrains a state from attempting to protect its private citizens from defamatory falsehood causing injury to reputation by allowing compensatory damages without predicating the recovery on a showing of some wrongdoing on the part of the publisher. To assess the liability solely on the basis that the

13. In a rather circuitous argument, appellees contend that falsity is inextricably bound up with proof of fault. Appellees assert that to prove fault the plaintiff in fact must demonstrate the falsity of the matter. While in some instances the plaintiff may elect to establish the patent error in the material to demonstrate the lack of due care in ascertaining its truth, it does not necessarily follow that negligence of the defendant can only be shown by proving that the material is false. A plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity. In such instance the presumption of falsity will prevail unless the defendant elects to establish the truth of the material and thereby insulate itself from liability. Where it is necessary to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so. This would appear to be a situation contemplated by former Chief Justice Roberts in his concurring opinion in Moyer v. Phillips, 462 Pa. 395, 404, 341 A.2d 441, 445 (1975) (Roberts, J. concurring, joined by Nix, J.). There it is suggested that "as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault; to this extent, the defendant is relieved of the burden of proving truth as a defense. *Id.* at 407-08, 341 A.2d at 447. That proposition will not, of course, hold true in all cases. Where negligence can be established without a demonstration of the falsity of the material, there is no additional obligation upon the plaintiff to prove the falsity of the material.

published defamatory utterance was erroneous would offend the "breathing space" that free debate requires. As we understand the thrust of the *Gertz* reasoning, it would not offend the principles articulated therein to place the burden of proving truth upon a defendant as long as the recovery is dependent upon the plaintiff's ability to establish the defendant's willful or negligent conduct in publishing the defamatory matter.

Our conclusion is bolstered by the fact that the *Gertz* holding adopted the view of the dissenters in *Rosenbloom, supra* at 64 (Harlan, J., dissenting); *id.* at 86-87 (Marshall, J., dissenting, joined by Stewart, J.), that the States are free to develop their own standards of liability for media defendants so long as they do not impose liability without fault. *See Gertz, supra* at 339, 347. In *Rosenbloom,* Pennsylvania libel law was under scrutiny and the dissenters were satisfied that their standards had not been violated. Although it was clear that the *Rosenbloom* Court was aware of the Pennsylvania requirement placing the burden of proving truth upon the defendant, nonetheless, neither dissenting opinion equated that allocation with strict liability. In fact, Justice Marshall plainly stated that Pennsylvania, unlike many other jurisdictions, did *not* apply a liability-without-fault standard. *Id.* at 87 n.13 (Marshall, J. dissenting). Moreover, the plurality which would have required the actual malice standard at no point suggested that Pennsylvania law attempted to impose liability without fault.

What the appellee is in essence arguing is that, even though the media publishes or reports maliciously or negligently a defamatory statement injurious to the reputation of a private citizen, it should be insulated from liability unless the plaintiff can affirmatively demonstrate the falsity of the statement. We find nothing in the Supreme Court decisions that would suggest such a result. The "breathing space" requirement of the First Amendment has not been extended, nor do we believe it can be reasonably extended, to condone or to encourage irresponsible conduct by the media in its exercise of informing the public of newsworthy events. Nor can we conceive of a legitimate constitutionally protected interest in

condoning the media's malicious or negligent discharge of this responsibility. Free debate will not be encouraged by allowing it to become the forum for malicious or negligent abuse of the reputation of those involved in the controversy. The right to criticize must carry some degree of responsibility, particularly where it may jeopardize the reputation of a private citizen.

We note further that a media defendant in a civil libel action is given even greater protection under our statutory law. In addition to the privilege to communicate matters of public interest and concern without fear of liability for erroneous information disseminated without negligence or malice, a newspaper publisher is privileged to withhold the identity of sources of information. The Pennsylvania Shield Law, 42 Pa. C.S. §5942(a), provides that:

> (a) General rule.—*No person* engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, *shall be required to disclose the source* of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

This statute has been interpreted broadly. *See, e.g., Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 278 (3d Cir. 1980); *In Re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963). There, sources are excludable whether or not they contain the identity of sources actually used by the newspaper since the identity of all persons named or implicated in these sources is also included within the protection of the "shield law". *Lal v. CBS, Inc., supra* at 100; *Steaks v. Deaner, supra* at 278; *In Re Taylor, supra* at 40, 193 A.2d at 185.[14]

As a consequence of this greater protection to the media defendant provided by the "shield law", the plaintiff in a civil libel action is restricted in his ability to prove the falsity of the defamatory statement. He is denied access to the sources of information on which the statement is based. The defendant, who does possess that information is therefore in a better position to prove the truth of the defamatory statement. Thus this additional protection to a media defendant and the resulting impediment imposed upon the plaintiff in seeking to establish the falsity of the statements provides a further justification for maintaining our current practice of requiring the defendant to prove truth in defense of such a suit.

C.

For the foregoing reasons we hold that in a libel suit brought by a private individual for compensatory damages resulting from the defamatory material, the presumption of falsity remains and the defendant has the option of proving truth as an absolute defense to the action. The trial court's instruction to the contrary was error and the resulting verdict cannot be allowed to stand. Since the verdict was a general one we are unable to ascertain whether the jury found for the defendants because of its conclusion that the plaintiff had failed to establish the falsity of the defamatory statements or whether the verdict reflects a finding that defendant was not negligent in publishing the material. The latter reason, of course, would have been a proper basis for the verdict, but the former reason is not in accordance with our law. Accordingly, the judgment of the trial court is reversed and a new trial is awarded as to the claim for compensatory damages.

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14. It must be noted that the shield law is designed to protect the confidentiality of the source; it was never intended to be interpreted as insulating the publisher from its negligence or actual malice.

III.

Since we are remanding the cause for a new trial on compensatory damages, it is also necessary to review appellant's assertion that the trial court erred in withdrawing from the jury's consideration the punitive damage issue. The trial court ruled that the appellant had presented insufficient evidence of the reporter's "actual malice" at trial so as to raise a triable issue of fact. We agree.

We should note that the *Gertz* decision has raised considerable controversy concerning whether it foreshadows the total abolition of punitive damage rewards in defamation cases.[15] In holding unconstitutional the awarding of presumed or punitive damages where defamatory publications are negligently published, the *Gertz* Court reasoned that the potential for large jury verdicts, completely unrelated to the actual injury suffered by the victim, might have a chilling effect or act as a prior restraint of free expression. *Gertz, supra* at 350-51. Further, the Court surmised that the doctrine of presumed damages and the unabridged discretion conferred upon juries to award punitive damages, bearing no relationship to the injury suffered, invites juries to punish the expression of unpopular opinion rather than effectuate any legitimate social goal. *Id.* at 350-51. Nonetheless, a number of courts have considered whether *Gertz* presaged the abolition

15. Some commentators believe that *Gertz* indicates the United States Supreme Court will ultimately abolish punitive damage in defamation cases. *See, e.g.*, Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 215 (1976); Comment, 28 Vand. L. Rev. 887, 897 (1975).

Other commentators have concluded that *Gertz* did not in itself abolish punitive damages but merely limited their availability. *See; e.g.*, Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rut.-Cam. L. J. 471, 507 (1975); Comment, 6 Loyola University Law J. 256, 267 (1975).

of punitive damages and have concluded that it did not.[16] We are satisfied that under the present law as articulated by the United States Supreme Court there has not been a sufficiently definitive directive to cause us to abandon the long standing practice in this jurisdiction of allowing punitive damages in the appropriate case.

The *Gertz* decision did make it clear that the negligent standard of fault would not be a sufficient basis for the allowance of punitive damages. To justify punitive damages, the plaintiff is called upon to satisfy the "actual malice" test. *Gertz v. Robert Welch, Inc., supra* at 350; *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 674 (5th Cir. 1984); *Braun v. Flynt*, 726 F.2d 245, 256 (5th Cir.), *cert. denied*, ____ U.S. ____, 105 S. Ct. 252 (1984); *Hunt v. Liberty Lobby*, 720 F.2d 631, 650 (11th Cir. 1983); *Golden Bear Distributing Systems of Texas, Inc.*, 708 F.2d 944, 947 (5th Cir. 1983); *Maheu v. Hughes Tool Co.* 569 F.2d 459, 479 (9th Cir. 1977); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026, 1030 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Buckley v. Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Carson v. Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Davis v. Schuchat*, 166 U.S. App. D.C. 351, 357, 510 F.2d 731, 737 (1975). We therefore turn to the question as to whether, upon this record, the trial court was correct in concluding that the evidence was insufficient to establish "actual malice". After a thorough review of the record, we are satisfied that the trial court's decision in this regard was correct.

16. Hunt v. Liberty Lobby, 720 F.2d 631 (11th Cir. 1983); Maheu v. Hughes Tool Co., 569 F.2d 459 (9th Cir. 1977); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976); Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976), Carson v. Allied News Co., 529 F.2d 206 (7th Cir, 1976), Davis v. Schuchat, 510 F.2d 731 (D.C. Cir., 1975); Selby v. Savard, 137 Ariz. 222, 655 P.2d 342 (1982); Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 932, 119 Cal. Rptr. 82, 85 (1975); Fopay v. Noveroski, 31 Ill. App. 3d 182, 198, 334 N.E. 2d 79, 92 (1975); Embrey v. Holly, ____ Md. ____, 442 A.2d 966 (1982); Newspaper Publishing Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132, 136 (1976) Calero v. Del Chemical Corp., 68 Wis. 2d 737, 228 N.W.2d 737, 747 (1975).

In assessing the propriety of the trial court's withdrawal of the issue from the jury, we are mindful that such a ruling should be entered only in a clear case. *Hefferman v. Rosser,* 419 Pa. 550, 215 A.2d 655 (1966); *Howard Express Co. v. Wile,* 64 Pa. 201 (1870). The publisher's hatred, spite, hostility or deliberate intention to harm the plaintiff is not sufficiently probative of his knowledge of falsity or awareness of probable falsity so as to allow its admissibility where "actual malice" is at issue, but once established, the elements heretofore enumerated would be admissible. *Cf. Greenbelt Coop. Publishing Ass'n v. Bressler, supra* at 10-11. As has been suggested, such testimony would invite a jury to improperly find a defendant liable where he acted with a guilty heart rather than a guilty mind. Also, it is axiomatic that a publisher's failure to investigate in itself is insufficient to establish "actual malice," *St. Amant v. Thompson, supra* at 732-33; *New York Times Co. v. Sullivan, supra* at 287-88; *Hunt v. Liberty Lobby, supra* at 643; *Brewer v. Memphis Publishing Co., Inc.,* 626 F.2d 1238, 1258 n.26 (5th Cir., 1975); *New York Times v. Conner,* 355 F.2d 567, 577 (5th Cir. 1966). So too, errors of judgment or interpretation as opposed to errors of historical fact have been held to be insufficient to create a jury issue of "actual malice." *Time v. Pape,* 401 U.S. 279, 290 (1971).

"Actual malice" can be established either by proving the publication was made with the knowledge of the falsity of its content or with reckless disregard of whether it was false or not. *Rosenblatt v. Baer,* 384 U.S. 75, 84 (1966); *New York Times Co. v. Sullivan, supra.* When the first alternative is relied upon, the plaintiff must show not only the falsity of the statement but, in addition, it is the plaintiff's responsibility to establish the defendant's knowledge of that falsity at the time of publication.

In this context it must be noted that the presumption of falsity available to the plaintiff where the negligent standard is applicable is of no assistance in meeting the burden of proving "actual malice" under this theory. The Supreme Court has made it clear that a presumption may not be used to satisfy the fault element of the cause of action. It is also to be noted

that under our traditional law such an approach would not be allowed. We have long recognized the evidentiary principle that a presumption may not be built upon a presumption. *Collins v. Hand,* 431 Pa. 378, 246 A.2d 398 (1968); *Auerbach v. Philadelphia Transportation Co.,* 421 Pa. 594, 221 A.2d 163 (1966); *Neely v. The Provident Life and Accident Insurance Co.,* 322 Pa. 417, 185 A. 784 (1936); *Philadelphia City Passenger Railway Co. v. Henrice,* 92 Pa. 431 (1880); *Douglas v. Mitchell's Executor,* 35 Pa. 440 (1860). In this instance it would require presuming not only that the content was false, but also that the defendant at the time of publication knew of that falsity. This is the clearest type of double presumption that we have rejected. *Cf. Collins v. Hand, supra; Auerbach v. Philadelphia Transportation Co., supra.*

In the instant matter there was no basis for the jury to have concluded that the publication was made with the knowledge of the falsity of its content. While the plaintiff attempted to show that the dissemination was made with reckless disregard of the truth of its content, it is equally apparent that a jury issue was not created under the clear and convincing test required for such an award of damages. *Bose Corp. v. Consumers Union of U.S., Inc., supra* at n.30, 85 L. Ed. 2d at 526 n.30; *Gertz v. Robert Welch, Inc., supra* at 342; *St. Amant v. Thompson, supra* 731; *Garrison v. Louisiana, supra* at 74; *New York Times v. Sullivan, supra* at 280; *Levine v. CMP Publications, Inc., supra* at 674; *Gertz v. Robert Welch, Inc.,* 680 F.2d 527, 538 (7th Cir. 1982), *cert. denied,* 459 U.S. 1226 (1983); W. Prosser, *Torts* 771-772, 821 (4th ed. 1971). Thus the trial court properly withdrew that question from the jury's consideration. *Hefferman v. Rosser,* 419 Pa. 550, 215 A.2d 655 (1966); *Thomas v. Tomay,* 413 Pa. 270, 196 A.2d 740 (1964); *Greet v. Arned Corp.,* 412 Pa. 292, 194 A.2d 343 (1963); *Luterman v. Philadelphia,* 396 Pa. 301, 152 A.2d 464 (1959); *Miller v. Montgomery,* 397 Pa. 94, 152 A.2d 757 (1959); *Hepler v. Hammond,* 363 Pa. 355, 69 A.2d 95 (1949).

IV.

Accordingly, the order of the trial court is reversed and a new trial is awarded. The new trial will be confined to a determination of defendant's liability and the assessment of compensatory damages if the liability issue is decided in favor of the plaintiff.

Mr. Justices Larsen and McDermott did not participate in the consideration and decision of this case.

Judgment

SUPREME COURT OF PENNSYLVANIA
Eastern District

MAURICE S. HEPPS, et al., Appellants	No. 18 E.D. Appeal Docket 1983
v.	(C.P. Chester, Civil Action-Law, No. 36 May Term, 1976)
PHILADELPHIA NEWSPAPERS, INC., et al.	

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the trial court is reversed and a new trial is awarded. The new trial will be confined to a determination of defendant's liability and the assessment of compensatory damages if the liability issue is decided in favor of the plaintiff.

BY THE COURT:

_____

Marlene F. Lachman, Esq.
Prothonotary

Dated: December 14, 1984